DOCUMENT RESUME

ED 168 386 HE 010 952

TITLE	Task Force Report on Affirmative Action.
PUB DATE	78
NOTE	102p.; Not available in hard copy due to small print ; Prepared by Young Americans for Freedom, Sterling, Va.
AVAILABLE FROM	Young Americans for Freedom, Route 1, Box 1002, Woodland Road, Sterling, Va. 22170
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Affirmative Action; Civil Rights Legislation; *College Admission; Court Cases; Disadvantaged Groups; Discriminatory Legislation; Educational Discrimination; *Educational Legislation; *Equal Education; Federal Government; Government Role; Higher Education; *Racial Discrimination; *Reverse Discrimination
IDENTIFIERS	Bakke Case

ABSTRACT

Issues raised by affirmative action are explored and a legislative agenda for reform is offered. Part One of the report examines affirmative action in practice and includes discussions of the Bakke case and affirmative action in the federal government. Part Two considers the legal aspect of affirmative action and reverse discrimination, and Part Three discusses the question of what can be done--short of more discrimination--to assist the minority community in gaining more economic and social benefits from society. In Part Four, several pieces of legislation are recommended, including the "Model Legislation" put together by the Task Force. (BD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED168386

Young Americans for Freedom

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

Young Americans for Freedom

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

TASK FORCE REPORT ON AFFIRMATIVE ACTION

Task Force Chairman: CLIFFORD J. WHITE III
Advisory Board Chairman: THE HONORABLE JAMES M. COLLINS

HE010952

YOUNG AMERICANS FOR FREEDOM
Route 1, Box 1002
Woodland Road
Sterling, Virginia 22170
(703) 450-5162

Young Americans for Freedom
Task Force Report on Affirmative Action

Task Force Chairman: Clifford J. White III
Advisory Board Chairman: The Honorable James M. Collins

Copyright 1978 by Young Americans for Freedom, Route 1, Box 1002, Woodland Road, Sterling, Virginia 22170. All rights reserved. No part of this book may be reproduced without permission in writing from the publishers.

Library of Congress Catalog Card Number: 78-63629.
Printed and published in the United States of America by Young Americans for Freedom.

Young Americans for Freedom
Task Force on Affirmative Action

TASK FORCE CHAIRMAN: Clifford J. White III
ADVISORY BOARD CHAIRMAN: The Honorable James M. Collins

TASK FORCE MEMBERS

Dennis Bechtel
University of Toledo
Law School

Kenneth Boehm, Esquire
Swarthmore, Pennsylvania

D. Richard Cobb
Rochester, New York

Frank Donatelli, Esquire
Houston, Texas

Michelle Easton
American University
Law School

Jeffrey D. Kane, Esquire
Bellevue, Washington

James Lacy, Jr.
Pepperdine Law School

Terry Quist
Harvard University Graduate
School

Clifford J. White III
Washington, D.C.

ADVISORY BOARD*

Mr. Thomas Ascik
The Heritage Foundation

The Honorable John M. Ashbrook
U.S. House of Representatives
from Ohio

Dean Alfred Avins
Wilmington, Delaware

The Honorable James L. Buckley
Former U.S. Senator from New York

The Honorable James M. Collins
U.S. House of Representatives
from Texas

Marco DeFunis, Esquire (ex-officio)
Seattle, Washington

Professor Donald Devine
Wheaton, Maryland

Maynard M. Dixon, Jr., Esquire
Washington, D.C.

Professor Roger A. Freeman
Hoover Institution on War,
Revolution and Peace

Professor Jeffrey Kart
Dartmouth College

Dean William F. Harvey
Indiana University School
of Law

Dr. Howard L. Hurwitz
HLH School Management Company

The Honorable Henry J. Hyde
U.S. House of Representatives
from Illinois

Louis Wilson Ingram, Jr., Esquire
The Foundation of Law and Society

Daniel Joy, Esquire
Sarasota, Florida

Professor Russell Kirk
Mecosta, Michigan

Dr. Robert Moffit
Washington, D.C.

Professor Charles A. Moser
George Washington University

ADVISORY BOARD (continued)

Dean Max Rafferty
The Troy State University System

Professor Charles E. Rice
Notre Dame Law School

Dr. George C. Roche III
President, Hillsdale College

Professor Hans F. Sennholz
Grove City, Pennsylvania

Mr. Edward C. Smith
Lincoln Institute for Research
and Education

The Honorable Clay Smothers
Texas State House of Representatives

Professor William A. Stanmeyer
Indiana University School of Law

Dr. Wayne Thorburn
Austin, Texas

Professor Miro Todorovich
University Center for Rational
Alternatives

Professor Stephen J. Tonsor
University of Michigan

Professor David Williams
Washington, D.C.

The Honorable John W. Wydler
U.S. House of Representatives
from New York

*Titles are for identification purposes only. The Advisors do not necessarily agree with the contents of each chapter in this Task Force Report and they do not necessarily endorse the legislation which is herein recommended.

This Report is presented with full confidence in the wisdom of the following sentiments expressed by these patriotic Americans:

Reverend Martin Luther King, Jr. (1963):

"I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident; that all men are created equal. . .'

"I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

Senator Hubert H. Humphrey (1964):

"If we started to treat Americans as Americans, not as fat ones, short ones, tall ones, brown ones, yellow ones or white ones, but as Americans. If we did that we would not need to worry about discrimination."

Justice William O. Douglas (1974; DeFunis v. Odegaard)

"There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of Blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards."

Justice Lewis Powell (1978;
University of California Regents v. Bakke)

"The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."

Special Appreciation

Special thanks are extended by the Task Force to the Honorable James M. Collins of Texas. Mr. Collins agreed to become Chairman of the Advisory Board and contributed much to this Task Force Report, both in terms of writing contributions to this publication and advice throughout the progress of the affirmative action project.

The Task Force would also like to single out The Honorable Robert S. Walker and Dr. Walter Williams for their assistance in the project. While neither was able to join the Advisory Board, their advice and assistance have been very helpful.

The Task Force is especially grateful to Judy Crenshaw of the YAF National Staff for laboring through several hours of typing and proof-reading. Without her patience, the Task Force Report would never have been completed.

Table of Contents

Preface . . . . . Page 8

Introduction . . . . . Page 10

About the Task Force . . . . . Page 15

Part I: The Practice of Affirmative Action

Had Bakke Gone the Other Way . . . . . Page 20
(by Professor Miro Todorovich)

One Student's View of Affirmative Action . . . . . Page 24
(by Clifford J. White III)

Affirmative Action: The State of the Art . . . . . Page 28
in the Civil Service (by Thomas Ascik)

Task Force Seminar . . . . . Page 33

Are Quotas Good for Blacks? . . . . . Page 42
(by Professor Thomas Sowell)

Part II: Legal Aspects of Affirmative Action

The Indecision on Bakke . . . . . Page 48
(by Marco DeFunis, Esquire)

The Constitutional Issues in the Bakke Case . . . . . Page 53
(by Kenneth Boehm, Esquire)

The Legal Issues of Reverse Discrimination . . . . . Page 58
(by John Zink)

Part III: Alternatives to Reverse Discrimination

Government Sanctioned Restrictions that Reduce Economic . . . . . Page 63
Opportunities for Minorities (Professor Walter Williams)

New Challenges for Black Economic Progress . . . . . Page 66
(by Edward C. Smith)

Table of Contents (continued)

Part IV: Congressional Reform of Affirmative Action

Task Force Sponsors Legislation . . . . . Page 71

-Model Legislation . . . . . Page 73

-An Agenda for Congress . . . . . Page 75
(by Representative James M. Collins)

-Walker Amendment . . . . . Page 78

-Walker Bill . . . . . Page 79

-Helms Bill . . . . . Page 80

-A Call to Action . . . . . Page 81

Appendix

-Appendix A: YAF Position Paper . . . . . Page 83

-Appendix B: Speech by Senator James L. Buckley . . . . . Page 84

-Appendix C: Letter to the Internal Revenue Service . . . . . Page 90

-Appendix D: Model Legislation . . . . . Page 95

-Appendix E: Walker Amendment to H.R. 12929 . . . . . Page 100

Preface

by The Honorable James M. Collins

Ours is an age of paradox. Because we live in a democratic republic, we expect the actions of our government to reflect the will, beliefs and values of the majority of our citizens. Yet almost every day brings fresh news of still another bureaucratic decree from Washington, D.C. seeking to implement a program of racial quotas. Such programs are anathema to most Americans and we can only wonder how much longer their long-suffering patience will tolerate such irresponsibility on the part of un-elected government officials.

Regardless of whether or not they are called "Affirmative Action," "Special Emphasis" or "Compensatory Discrimination," racial quotas in education and employment have long been rejected by the majority of those expressing opinions in poll after poll on the subject. This majority cuts across racial lines and transcends regional and professional borders. Most Americans believe it is wrong to discriminate either for or against an individual solely on the basis of his skin color.

Former Supreme Court Justice William O. Douglas said it best: "Consideration of race as a measure of an applicant's qualifications normally introduces a capricious and irrelevant factor. . .There is not constitutional right for any race to be preferred. . ." Whether the specific issue be that of a medical school's admissions or the hiring of new employees in a private business, merit, not race, should always be the decisive qualification consistent with the dictates of both justice and common sense.

Niether common sense nor the judicious application of the Constitution has ever characterized the actions of Washington's social action bureaucracy. Despite the clear majority sentiment against quotas, the bureaucrats blithely plunge along issuing orders for more and larger quota programs. The cost of the federal government's various Affirmative Action efforts exceeds $500 million each year and involves 20 different agencies. The cost to private industry and the educational sector has yet to be quantified, though all experts agree that it is immense and increasing.

The Supreme Court failed in its Bakke decision of 1978 to resolve the major issues raised by racial quotas. Constitutional logic and most other factors led most of us to anticipate a Court ruling in Bakke's favor. We also expected the Court to reject all racially-derived quota programs, regardless of the particular bureaucratic nomenclature employed to camouflage their nature, as a violation of the Civil Rights Act of 1964, the Fourteenth Amendment and the intent of Congress in mandating equal opportunity for all minorities.

Fortunately, the Court admitted Bakke; yet it approved, with the White House encouragement, "racial factors" and thereby coined another euphemism for quotas. The Supreme Court and the President having now failed to respond, it is up to the Congress to heed the will of the people by outlawing quotas.

The Congress must act soon. More and more Americans are becoming less and less patient with Washington's officious, overbearing little bureaucratic tyrants who flaunt the Constitution and the basic values of the people by ordering schools, businesses and institutions to discriminate racially in their hiring, firing, promoting and admitting activities.

Plain, average white Americans grow more resentful at the injustice of being blamed for his long-dead ancestors' deeds. So, too, do minority Americans grow more uncomfortable with government quota programs when they realize that their comparative median income has actually fallen since 1970, the first year Washington began imposing racial quotas specifically designed to "close the income gap."

This Task Force Report is an important part of the campaign to focus upon the Congress the latent strength of the majority sentiment in America against racial quotas. Thomas Sowell, the respected black economist and author, has called the assumption underlying racial quotas ---the idea that group representation is a proper vehicle for individual compensation--the "noble lie of our time." The enduring truth of this and all times in America is that the will of the people cannot long be denied. I am confident that the ideas and efforts embodied in the pages that follow will prove to be crucial steps along the path towards once again illustrating the wisdom of that truth.

The first question to be addressed when discussing the issue of affirmative action is: What is affirmative action? The problem in providing an answer is that there is no single definition of the phrase. It is contained in no law passed by the Congress and it is defined differently in bureaucratic regulations which were devised, ostensibly, to enforce civil rights laws. If the practice of affirmative action may be used to arrive at a single definition of the phrase, though, affirmative action involves the use of quotas and preferences in gaining employment and college admission on account of race and sex. This definition, however, is at odds with what affirmative action is supposed to be, or as it is often represented to be by its defenders.

Advocates of affirmative action say that affirmative action involves goals for hiring and admitting students according to race. This is justified as an effort to overcome the effects of past discrimination. Seldom are outright quotas justified, even by affirmative action's stauchest defenders. A cursory review of affirmative action in practice shows the activity for what it is: outright racial discrimination. Take just a few examples:

-Grove City College in western Pennsylvania, a Christian School which boasts that it charges the lowest tuition and room and board rates of any private school in the country, is being threatened with loss of all federal funds because it does not comply sex discrimination regulations. The loss of federal funds would, of course, cause much financial hardship on the university and its students. It is the hope of H.E.W. Secretary Joseph Califano that just such a threat will blackmail the school into complying with H.E.W. regulations. The only problem with Califano's threats is that Grove City College receives no federal assistance.

Rather than to end the harassment, the federal government informed Grove City President Charles MacKenzie that "they would bring (the college) into compliance one way or another." The solution was for H.E.W. to threaten to end all federal student financial aid until Grove City complied with bureaucracy's wishes.

Not only is H.E.W. holding the education of Grove City's students as hostage, but it is unclear just how the college is discriminating. Regulations issued in order to enforce a law referred to as Title IX require everything from co-educational physical education classes and affirmative action to correct the effects of past discrimination. It is doubtful that the elected representatives in the Congress which passed the law ever intended for it to be construted in such a fashion. But, then again, most federal discrimination suits and fund cutoffs occur without any evidence of outright discrimination.

The Grove City College case is just another example of the affirmative action mentality in action.

-In the federal government's fervor to bring about specific quotas in employment and college admissions, the Congress enacted the Public Works Capital Development and Investment Act of 1976. Under the law--in this case there can be no charge that the bureaucracy is subverting the will of the men who made the law--states and localities are required to spend at least ten percent of the money distributed under the Act to construction firms which are minority-run. Not only is such a plan inequitable, as this Report

discusses throughout, but there are many cases of fraud. Syndicated columnist Jack Anderson revealed one such case allegedly involving Choi Enterprises of Pittsburgh. For a fee, company Owner Soo S. Choi, who is Oriental and thus eligible for the preferential program, allegedly lends his name to government bids so that the white-owned firms may still bid for the contracts. According to Anderson: "In one instance, Choi advised one contractor on a Pittsburgh project to make his own purchases but have his bills sent to Choi. Choi then rejiggered the itemized payment voucher, added a 7 percent commission and returned it to the customer."

Whether or not Anderson's specific allegations against Choi Enterprises are correct, it is clear that government-enforced reverse discrimination has made a mockery of the concept of equal opportunity and economic competition, to the detriment of everyone, especially the American taxpayer.

-Philip DiLeo grew up in the economically deprived Little Italy section of New York City. His family moved to Colorado, where young DiLeo became a policeman and worked his way through college at night. For his service to his local community, DiLeo received two community awards. When he decided to attend law school at the University of Colorado, he took the LSAT standardized test, given to all law school applicants. DiLeo scored below the normal admissions standards for the University of Colorado, so he applied to the School's special admission program, which was ostensibly available to "disadvantaged" applicants who might demonstrate much potential as law students, despite lower grades and test scores. DiLeo was accepted under the special program. However, when the admissions committee discovered that DiLeo was Italian, and not Hispanic as they had at first assumed, DiLeo was rejected. When he objected and insisted to the admissions committee that he was disadvantaged, the school admitted that DiLeo was disadvantaged, but that Italian-Americans were not one of the "protected" classes. The school's program was, in reality, available only to blacks, American Indians, Hispanics and Asian Americans. The school admitted that ethnic and racial considerations were the prime requirement for consideration under the special program. Here is a clear example of a state government following the lead of Washington, D.C. in using public funds in a discriminatory manner.

A Colorado District Court upheld DiLeo's claim that the law school's program was unconstitutional and the case is now on appeal.

-The Internal Revenue Service has proposed a series of new antidiscrimination regulations which would affect more than 3,500 private and parochial schools. Under the new regulations, private schools which operate in communities whose public schools are under a court-ordered busing scheme would be presumed to practice discrimination unless they prove otherwise. In a complete reversal of fundamental Western jurisprudence, the accused would be presumed guilty.

In order to vindicate itself, a school would have to meet four of five criteria used by the bureaucracy in determining whether or not a school is discriminatory and therefore not eligible for tax-exempt status. Among the five criteria are 20 percent minority student enrollment, scholarships awarded on a "significant basis" (re preferential) to minorities, employment and special recruitment of minority teachers and something referred to as "minority-oriented curriculum."

The Internal Revenue Service is accepting public comments until October 23, 1978, after which time the regulations will go into effect. The Congress, however, could veto the regulations. At time of publication of this Task Force Report, though, it was clear that the Congress would do nothing, save a few members who would probably object to the I.R.S. Young Americans for Freedom officially responded to the I.R.S., the text of which response is in the Appendix.

Young Americans for Freedom opposes discrimination based upon race and sex. Moreover, we believe that the practice, when enforced by federal or state authorities, is patently illegal. Take for example the 1964 Civil Rights Act, which is used by the federal bureaucracy as the legal mandate for government-enforced affirmative action programs. In Title VII, the law explicitly states that: "Nothing contained in this title shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group..." President Lyndon Johnson issued Executive Order No. 11246 in order to give more teeth to the civil rights law. In that order, Johnson described affirmative action as an effort "to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin."

The Task Force Report on Affirmative Action represents an attempt to explore the issues raised by affirmative action and to offer a legislative agenda for reform. Task Force members, ranging from Jim Lacy of California who debated the American Civil Liberties Union on local television, to Clifford White in Washington, D.C. who also represented YAF on radio and television, have argued that affirmative action is illegal, unconstitutional and simply wrong.

In Part I, the Report looks at affirmative action in practice. First, Professor Miro Todorovich looks at the consequences "Had Bakke Gone the Other Way." Professor Todorovich has been involved with the issue of reverse discrimination for many years, having counseled Senators and Congressmen on the matter and published articles in several journals. Professor Todorovich, a physics professor, can truly be said to be an expert on the subject about which he writes.

In the next chapter in Part I, Task Force Chairman Clifford White discusses a personal view of reverse discrimination. While Todorovich provides a clinical overview of the situation in higher education, White offers his account of what the effect of reverse discrimination is on the individual--the one who loses a job or have his academic record questioned because of widespread affirmative action programs which consider merit behind race in determining employment and admissions.

Thomas Ascik of the Heritage Foundation provides a well-researched look at affirmative action, as practiced within the federal government. Ascik gives several examples of where the affirmative action concept has been applied to arrive at totally outlandish programs within the civil service.

While Ancik's article, together with those of Todorovich and White, provide a general outline of affirmative action at work, and all the difficulties it presents, Thomas Sowell's article from Commentary magazine poses the question: "Are Quotas Good for Blacks?" Professor Sowell, an economist from UCLA, answers with an empnatic "no." According to Sowell, affirmative action is counterproductive, creating no new jobs or better quality education, for the black community. Instead, affirmative action is the "noble lie of our time," which feeds the belief that minorities are unable to care for themselves, that they need preferential treatment if they are ever to compete on an equal footing with individuals of other races. Sowell also attacks the validity of measuring representation and underrepresentation in a work force or college class as an indicator of discrimination. Professor Sowell urges that government officials and university administrators reject paternalistic policies involving racial discrimination and instead seek to downplay tensions between the races.

An unofficial transcript of a panel discussion which was held on Capitol Hill and sponsored by the Task Force rounds out Part I. The participants touch on most aspects of the problem and provide a general overview of the situation.

In Part II, the legal aspect of affirmative action is considered. In the first article, "The Indecision on Bakke," Marco DeFunis, who brought the first reverse discrimination case to the Supreme Court four years ago, says that the Bakke decision was ambiguous and invited new rounds of litigation before we will finally know whether or not public tax money may be used to prefer one race over another in order to reach any particular quotas of races in work forces and student bodies. DeFunis filed an amicus curiae brief in the Bakke case, representing Young Americans for Freedom.

Ken Boehm, an attorney and member of the Task Force, offers a view similar to DeFunis' on the effect of the Bakke decision. Boehm also offers a legal analysis of how the Burger Court in 1978 may have altered prior legal precedent on civil rights matters. John Zink, in an article reprinted from New Guard magazine, sums up constitutional law relating to the use of racial discrimination by the government. The Zink article offers a well-researched and concise history of constitutional cases dating back to Brown v. the Board of Education of Topeka. (1954). All three authors agree on what the law previously has been, and what the Bakke decision should have said: quotas are illegal. DeFunis and Boehm, who wrote their pieces after the Bakke decision, are able to go a step further and comment upon the practical meaning of the Bakke case.

Part III discusses the question of what can be done--short of more discrimination--in order to assist the minority community in gaining more economic and social benefits from society. Dr. Walter Williams, an economics professor at Temple University, says that the primary reason that black Americans are economically disadvantaged is that the government has imposed economic barriers which prevent lower-income Americans from getting new jobs or starting businesses of their own. Without a high minimum wage, licensure fees and the like, according to Williams, black Americans would be able to make significant economic strides as past groups of disadvantaged Americans were able to do.

Continuing on with this theme of how minority Americans can grab a larger share of the economic pie in this country through the private enterprise system, educator and former White House aide Edward C. Smith offers his view that "black capitalism" is the only viable alternative to an eternity of dependence on the "federal plantation" for economic survival. Williams and Smith, both of whom are black, view affirmative action as a hindrance to minority economic progress and both discuss ways in which real progress can be made by the minority community through the American economic system.

In Part IV, several pieces of legislation are recommended, including the "Model Legislation" which was put together by the Task Force. Representative James Collins, Chairman of the Advisory Board to the Task Force, offers a chapter in Part V which discusses three bills which he intends to pursue in the next Congress.

The Appendix includes background materials which were referred to in the text of the Task Force Report, including a speech by former Senator James L. Buckley and the full text of the "Model Legislation" which the Task Force hopes will be introduced soon in the United States Congress.

ABOUT THE TASK FORCE

Young Americans for Freedom has a long-standing interest in the issue of reverse discrimination. Racial quotas, "goals and timetables" and other elements of government-imposed affirmative action programs have discriminated against primarily the group of Americans whom we represent: young people. When the Department of Health, Education and Welfare undertakes a "compliance review" of colleges across the country, done in order to determine if minority group representation on a faculty is below a prescribed target figure, it is our constituency which suffers from a faculty which is hired based upon race instead of merit. When a college spends literally hundreds of thousands of dollars each year in order to placate HEW and administer an acceptable affirmative action program, it is the students who pay the costs, through higher tuition. When certain misguided university administrators follow the lead of the federal government and institute quotas of their own, in terms of admitting students, again it is YAF's constituency which bears the brunt of the activity.

Although the average age of a member in Young Americans for Freedom is 20 years old, not all of our members are students. While we are primarily a college-based organization, among our 500 local chapters are many community groups, which include young Americans who are entering or have recently entered the employment market for the first time. They, too, are directly threatened by affirmative action programs. The Department of Labor forces government contractors to undertake racial quota programs. Our members, who are likely to have the least seriority and to lack the job skills which only experience can bring, are more likely to lose a job which is set aside only for members of one of the "protected" racial or ethnic groups which the federal government considers disadvantaged.

Minority group members who belong to YAF have a large stake in this issue, too. Affirmative action operates from the premise that blacks, Spanish-surnamed citizens and a few other groups of Americans are inherently incapable of competing in the marketplace of employment and college admissions. It would be hard to devise a more paternalistic or insulting plan with which to stigmatize an individual or group of individuals.

In summary, our 55,000 members are the most directly and negatively affected group of Americans who are exposed to affirmative action programs which involve racial considerations.

There are several other reasons why Young Americans for Freedom is particularly interested in this issue. As individualists, we are appalled at classification of individuals according to group, instead of personal merit. As believers in competition and the American work ethic, we are upset about the erosion of those principles through an alien desire for "equality of result," whereby some social purpose is thought to be served by dividing up educational and financial benefits according to racial and ethnic groups. Equality of opportunity, an age-old American credo, guarantees inequality of result and that is as it should be. Since we are concerned about increasing the level of opportunity for all Americans, especially younger Americans who are at the point in their lives when they have the enthusiasm, energy and optimism to try to climb higher up on the ladder of success than did their parents and grandparents, we disagree with government-imposed economic barriers which discriminate against disadvantaged Americans. Affirmative action fails to address itself to the problem of increasing the number of jobs and opportunities for quality education for all of our

citizens. Instead, it pits one race against another.

As young Americans who have had to suffer because of the injustices of the past, we do not want a return to the day when racial discrimination was not only practiced, but often was legally mandated. We reject racial criteria in hiring and college admissions as a backward step. We are young enough and still idealistic enough to want to work for a better day. The dream which Martin Luther King, Jr., told us about in 1963 is our dream too. "I have a dream," said Reverend King, at the foot of the Lincoln Memorial one hot summer afternoon fifteen years ago. That dream is shared by Young Americans for Freedom. We look forward to the day when we can all "walk together as sisters and brothers," regardless of such inconsequential factors as the color of one's skin.

Young Americans for Freedom is honored to have several distinguished Americans join us in our attempt to move ahead toward the day when individual merit will be the sole factor in determining social advancement. Our Task Force, which is composed of leaders in Young Americans for Freedom, is pleased to have assembled a Task Force Advisory Board which includes several prominent members of Congress, attorneys, university professors and other individuals who are experts in the area of affirmative action. In addition to our Board of Advisors, we are grateful to those other interested individuals who could not join the Task Force Advisory Board, but who have lent their support and assistance to our efforts.

YAF ISSUED BRIEF IN BAKKE CASE

Because we felt so strongly about the issue of reverse discrimination, YAF filed an amicus curiae ("friend of the court") brief with the United States Supreme Court in behalf of Allan Bakke. Our attorney in the case was Marco DeFunis, who suffered similar discrimination when he applied to law school a few years ago. The DeFunis case was the first major reverse discrimination suit to reach the high Court, but was declared moot because DeFunis had already graduated from law school by the time the Court heard the case.

The case of Allan Bakke is a classic one. An outstanding student, he was denied admission to medical school at the University of California at Davis because 16 out of 100 seats were set aside for minority group applicants. The university admitted that the program was designed to benefit only "protected classes" and that it could not prove that Mr. Bakke would have been denied admission if the school had not instituted the preferential admission policy. Bakke's credentials were better than any of those who were admitted under the separate program. Bakke's credentials were evaluated by taking into account not only test scores, which some have called "culturally biased," but also subjective criteria, such as the admissions officers' evaluations after an oral interview.

Although Bakke's student interviewer described him to the Admissions Committee as "friendly, well tempered, conscientious and delightful to speak with," his overall "benchmark" score was just below the cut-off point. Those who qualified under the minority admissions track, however, were not burdened by this minimum requirement.

Attorney DeFunis filed the brief in our behalf in August of 1977. The media coverage was overwhelming. It seemed as if those in the press could not believe that a group of young people, who are supposed to be the most

liberal element in the society, were so set against quotas. Our attorney, already well-known to the media, also attracted attention. Nearly 60 amicus curiae briefs were filed. On the side of YAF were several non-conservative groups, including the American Jewish Committee and the Sons of Italy. Clearly, public opposition to racial quotas was widespread and cut across political and ethnic lines.

TASK FORCE ESTABLISHED

In order to make clearer to the public the importance of the issue and the broad base of support which the anti-quota, pro-equal opportunity forces enjoyed, YAF decided to form a Task Force on Affirmative Action which would include both conservatives and others who were not identified with one end of the political spectrum. We wanted the Advisors to play an active role in the Task Force and to help us plan events and issue a Report which would be noteworthy and useful to the public.

With the publication of this Report, together with past activities and future plans, the Task Force submits that it has succeeded.

We cannot emphasize enough how proud we are to have as Advisors so many distinguished Americans. We point out, though, that by their presence on the Advisory Board of the Task Force, these individuals are not necessarily endorsing YAF's positions on other issues.

PURPOSE OF THE PROJECT

As with other YAF projects, we hope that two goals are simultaneously achieved. First, we want to educate our members and the public about an issue of vital concern to all of us. We want to spread our point of view on an intellectual level. Past projects along similar lines include our establishment in 1970 of the "University Research Committee," which offered a lengthy rebuttal to the Scranton Commission on Campus Violence, publication of a booklet which included seriously researched articles on the problems we perceive inherent in trade with Communist countries and publication of a fact-finding report on Vietnam, which was put together by YAF representatives who travelled to South Vietnam in order to learn first-hand the reasons we were fighting and what were our chances of success.

In meeting our obligation to educate the public, especially young people, we will distribute our Report to several university libraries, college professors and noted opinion-makers.

In addition to communicating on an intellectual level, we want to help effectuate change in public policy. As sociology professor Richard Weaver wrote, "ideas have consequences." We want our philosophical position to be translated into political action. YAF is a group which is involved with ideas, without being bound by any rigid party affiliation. In addition, we are involved with political action. In short, we are both principled and pragmatic.

MODEL LEGISLATION

In keeping with our goal to have an impact on public policy, we have endorsed seven pieces of legislation in this Report. Some of the bills are

already under consideration in the Congress. Another, the "Model Legislation," has not yet been introduced. We hope that it soon will be and that after the new Congress convenes in January, the matter will be seriously taken up.

The legislation the Task Force herein endorses represents a practical and honest way to approach the difficult issue of affirmative action. Affirmative action which is not geared toward racial quotas or racial preference is not at all attacked.

Whether or not the Congress deals with the issue in the immediate future, it someday will have to. This model bill will remain as a debating point and resource from which others can build.

Young Americans for Freedom and the Task Force will lobby on the legislation we endorse. We will continue to be active on both the intellectual and political fronts. With the continued assistance of our Advisors, we are confident that we can have a positive impact.

TASK FORCE ACTIVITIES

The first order of business has been to call public attention to our position on the issue. In this regard, we feel that we have been very successful. Several Task Force members have appeared on radio and television shows, both nationally and locally around the country. The Task Force includes several very knowledgeable and articulate representatives of the anti-quota position. We will continue to seek other forums in which to present our case.

We have distributed a list of speakers in an effort to arrange for Task Force members and Advisors to speak and debate on the topic of affirmative action at campuses around the country. We plan all-day campus conferences for the fall and spring semesters. It is young people who stand to gain from reform of affirmative action and so we must try to communicate that message especially to the youth of our country.

We sponsored a Congressional seminar for Capitol Hill staff members and interns last summer. The panel of speakers was very distinguished, including economist Walter Williams, Representative Robert Walker, Thomas Ascik of the Heritage Foundation and Louis Ingram of the Foundation for Law and Society. Similar events are planned for the future.

We hope that the Report which follows serves as a useful research tool for those who study the subject. Further, we hope that the booklet and its recommendations are seriously considered by the Congress. We have tried to distribute this report free of charge to as many in the media, Congress and at the college level as possible. In addition, we are making the Report available at a charge. Additional copies may be received by contacting:

Young Americans for Freedom
Task Force on Affirmative Action
Route 1, Box 1002
Woodland Road
Sterling, Virginia 22170

(Please send a check or money order for $2.00 made out to Young Americans for Freedom)

PART I:

THE PRACTICE OF AFFIRMATIVE ACTION

HAD BAKKE GONE THE OTHER WAY

by Professor Miro M. Todorovich

Rarely in recent times has a single event enjoyed such extended attention as did the case of Allan Bakke. A record number of amici approached the Supreme Court and meetings were held on Capitol Hill to influence the decision. People from every social and professional background debated the merits and morals of the question and hardly any publication, no matter how specialized, could avoid discussing some feature of the Bakke story. Yet, despite this enormous outpouring of spoken and written work, prior as well as following the announcement by the justices of their lengthy and meandering decision, there is still little agreement on what has actually occurred and what the decision entails.

Just the other day Charles Lowrey, the chairman of the admissions committee at the University of California-Davis, said that he would "do it again in a minute." He claimed that Bakke's advanced age and engineering degree worked against the applicant. However, at about the same time, Davis and Dr. Lowrey's committee also rejected Rita Clancy, a young applicant who did not possess a professional certificate. (She is now entering her second year thanks to the Bakke challenge). This confusion on matters of fact* is reflected in matters of judgement. The same quarters which until the day of the decision insisted that a ruling in favor of Bakke would mean a total disaster for the future of minority people in America discovered the day after the ruling that there is really no change. Much of such talk may be politically motivated. Still the magnitude of the turnaround betrays considerable incertitude.

The academy (and the nation) finds itself therefore in an unenviable position of not knowing how to act and how to assess the ruling. Bakke raised some questions which seemed singularly important and yet the Supreme Court pronouncement while deciding the most tangible question — whether Bakke shall get into the school — left many important questions open to interpretations.

There are several options which the Court has not exercised and this negative aspect of the Bakke ruling is every bit as important as what the Court seems to have done. The nonevents are also much more tractable. Let us inspect some of them.

The decision could have gone against Bakke and the quota at the Davis school would have been affirmed. The consequences for other institutions would have been swift and quite sweeping. Federal regulations would have appeared asking every college and university of this country to immediately enter into self-analysis of the available pool of entering students and to establish admissions quotas for the federally approved minorities. This would have triggered

---

* Many people are not aware of the significant disparity between Bakke's qualifications and those of special admittees. The comparative tabulation (for 1973) is as follows: scientific grade point average (SGPA) — 3.34 vs. 2.62, overall grade point average (OGPA) -- 3.51 vs. 2.88, Medical College Admissions Test percentiles — 96 vs. 46, (verbal), 94 vs. 24 (quantitative), 97 vs. 35 (science), and 72 vs. 33 (general information). In 1974 the respective numbers were: SGPA 3.44 to 2.42, OGPA 3.51 to 2.62, MCAT verbal 96 to 34, quantitative 94 to 30, science 97 to 37, and general information 72 to 18.

events along two basic directions. On the one side, the earlier fight for quotas would have become transformed into a struggle for larger quotas. On the other side, the left-out ethnic groups, noting the success of the militants would have entered the battle for their own piece of the admissions pie. None of these developments could have helped the causes of tranquility and concilation and the nation would have embarked upon a prolonged period of social turmoil and unrest.

The high court could have also yielded to suggestions that the Fourteenth Amendment to the Constitution was not meant to protect equally every citizen of this country. Pressures on the justices must have been considerable vide the vehemence and forthrightness with which the Powell majority decision treats this point:

"The guarantees of the Fourteenth Amendement extend to persons. Its language is explicit: 'No state shall... deny to any person within its jurisdiction the equal protection of the law.' It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendement are, by its terms, guaranteed to the individual. They are personal rights'... The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."

After an extended lecture on the history of the Fourteenth Amendment, Justice Powell continues:

> As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination... The guarantees of equal protection, said the Court in Yick Wo, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."...It sufficies to say that "[o[ver the year, this Court consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"

Powell concludes, "Once the artificial line of the 'two-class theory' of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority are intractable."

This should put to rest, at least for the time being, the "some are more equal than others" interpretation of the Fourteenth Amendment.

The Justices had also to grapple with certain tenets of the broader concept of reparation. One among them deals with the extent to which a certain state of affairs is attributable to prior discrimination. Justice Powell describes the disagreement within the court as follows:

> As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers Brennan, White, Marshall, and Blackmun that the portion of the judgement that would proscribe all consideration of race must be reversed. . . But I disagree with much that is said in their opinion. They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups "by society at large," . . . (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination: "If it was reasonable to conclude—as we hold that it was--that the failure of Negroes to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis's special admission program.". . .
>
> The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants--nothing is said about Asians. . . — would have made better scores. Not one word in the record supports this conclusion, and the plurality offers no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since if it may be concluded on this record that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination". . . may not claim it, in any area of social intercourse."

Another tenet of the reparational theory would impose hardship on any member of the so-called "others." Here again Justice Powell - writing for the majority - disagrees. "[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved."

But for the careful legal navigation of Justice Powell, the Supreme Court decision could have also gone the strict constructionist way. From such a vantage point "without regard to race" would then have been viewed as synonymous with "colorblind" and the ruling of the California Court would have been upheld in its totality. The simplicity of the colorblindness principle would have been matched by the broadness of its impact. All governmentally prescribed or voluntarily enacted programs involving racial classifications would have been ruled illegal. In particular, the existing regulations of the Labor Department binding contractors to do considerable amounts of hiring by race would have to have been drastically revised in order to comply with the wording of the Executive Order 11246 (Amended) which demanded that employees be hired and retained "without regard to race..." This would have also brought governmental regulations in line with the requirements of Title VII of the Civil Rights Act as interpreted by the Fifth Circuit Court of Appeals. At the same time, however, such a colorblind ruling in Bakke would have raised a considerable political storm, and activism of the day could have possibly transcended the confines of the constitutionally defined governance of the nation. These possible consequences the Court was apparently not prepared to contemplate and by creating a two-way five-to-four majority the justices gave each camp in the Bakke controversy half of the judicial loaf. To either side, this may not constitute a fully just decision but the ruling may, nevertheless, prove to be a viable solution.

Instead of mandatory streamlining on the side of quotas or of colorblindness, the Powell decision has actually left the universities with the option to do or not to do. Surely, various interest groups will try to influence by pressure the decision of academic committees and a stand based on principles will not always be popular or easy. Faculties and administrators will have to decide whether and to what extent should race play a role in the complex process of student admissions in the same way in which they had to decide earlier whether and to what extent should geography play a role in the student selection process. The Court has given colleges and universities a considerable latitude and responsibility in this matter and it is now up to the members of the academy to articulate and implement with courage and conviction a far, just and educationally sound approach.

Dr. Miro M. Todorovich is a professor of physics at C.U.N.Y. He has been involved with the issue of affirmative action for several years. He serves as Coordinator of the Committee for Academic Nondiscrimination and Integrity, a group of university professors who oppose government-imposed affirmative action. He is also Executive Secretary of the University Center for Rational Alternatives. Dr. Todorovich is actively involved with other public policy questions and he is Executive Secretary of Scientists and Engineers for Secure Energy. He has been published widely in the educational, scientific and civil rights fields.

One Student's View of Affirmative Action

by Clifford J. White III

This essay represents a single individual's perspective on affirmative action. This is not a very fashionable light in which to make an argument, since affirmative action is predicated upon the belief in the supremacy of the group, instead of any individual citizen. Nonetheless, an individual opinion is the best which anyone can hope to proffer, for only individuals, not collections of people in a mythical whole, can reason, enjoy the fruits of positive public policy or be victimized by programs which are unjustified on either moral or practical grounds.

The philosophy of group rights over individual rights, which is embodied in affirmative action, is both impractical and unfair. As an individual, not merely a statistic which helps to make up any nebulous category of Americans, I oppose affirmative action on three fundamental grounds: first, quotas ignore individual circumstances and mandate invidious discrimination against one group of citizens in behalf of another for the present, and invite such discrimination against both groups for the future; second, affirmative action, as it is currently practiced, strikes at the very heart of individualism, at the sense of personal achievement and self-worth; third, group responsibility should not be thrust upon any individuals, especially when there is no logical evidence to support the assertion that any particular individuals, or their forebears, owe their current advantages to harms heaped upon others in the past.

To expand on the first point, it seems that the affirmative debate deals only with a concern for the group. Group responsibility, group rights and the history of discrimination by one group of Americans against another compose the major concepts behind racial quotas. Aggregate statistics, not individual cases, are the benchmark used to determine illegal racial discrimination. The Equal Employment Opportunity Commission presents a good case in point. It usually only litigates in class action suits, by a group of alleged victims against errant employers. Individual complaints are seldom considered.

Individuals are discriminated against, not races in the aggregate. The emphasis on the welfare of the group could someday lead to more harms for the individuals within the group. If an employer meets his affirmative action quotas, and employs X percent of blacks and Chicanos, this is not *ipso facto* proof of nondiscrimination. A quota is not only a minimum requirement; it also represents a ceiling figure. Although the federal bureaucracy is satisfied with minimum group representation in a particular firm, the employer may still be discriminating so as not to exceed his quota. The quota could provide a justification for the bigoted employer to discriminate against racial and ethnic groups which he dislikes. What solace can a particular black man take in knowing that a certain percentage of his racial group is represented in his employment category?

As a recent college graduate, I have completed the process of applying to law schools. Foremost on my mind and that of several friends who were also applying to professional schools was the fact that we would have to possess higher overall qualifications in order to be admitted than would someone who happened to be a member of one of the so-called "protected" classes (i.e., usually including blacks, Spanish-surnamed, Orientals and American Indians).

It is true that white Anglo-Saxon Protestants are well-represented in the legal community. It is also true that Italian-Catholics and other European ethnic and religious groups are represented in both undergraduate and graduate schools, including the Ivy League. However, this does not mean that discrimination against members of these groups does not exist.

Virtually every application I filled out included in the instruction booklet a paragraph about the school's policy of non-discrimination. Paradoxically, the paragraph usually said that minority candidates were encouraged to apply. This was a subtle way of hinting at the fact that preferences were granted according to race, ethnic background and sex. The DeFunis and Bakke cases clearly demonstrated that this indeed is the situation with many schools around the country.

It's curious to some that a large number of prominent Jewish-Americans are among the leading opponents of affirmative action. After all, many of those individuals who opposed the N.A.A.C.P. and other civil rights groups in the Bakke reverse discrimination case were once allied with those groups in civil rights causes in the past. The fact of the matter is that it should be more curious that the N.A.A.C.P. and other civil rights groups did not also defend Allan Bakke in his application to medical school at the University of California. Jewish-Americans know better than most how invidious quotas really are. Although Jews are "disproportionately" among the most educated segment of our society, and while the share of Jewish Nobel Prize winners, lawyers and doctors in the United States is "disproportionate," this has occurred in spite of quotas directed against Jews. One need not look very far back into our country's history--indeed, one need only to look around today--to find that quotas kept Jews out of many distinguished institutions of higher learning. Quotas did not guarantee Jews adequate representation; rather, quotas were used to hold down the number of Jewish graduates from universities and the number of Jews in the professions.

Unless one believes that black and other bureaucratically classified "preferred" groups of Americans will never be able to qualify in great numbers for the professions and skilled trades, then it is altogether possible to conceive of the same quota which guaranteed sixteen seats at the University of California at Davis Medical School for minority groups someday being used to limit the number of black graduates from that medical school to only sixteen.

Another harm inherent in affirmative action programs has to do with the psychological factor of self-worth. I was fortunate to have been accepted to some high quality law schools. However, I also know that my application was considered according to the strictest scrutiny. I am proud of this fact. Although other white students who applied to graduate schools are well-represented in the professions, I know that I made it as an individual, not because I happen to be a white male.

Due to affirmative action programs, however, blacks who were accepted according to the very same schools where I was will never really know if they made it on account of individual merit or the color of their skin. I can think of few more demeaning albatrosses to carry around for the rest of one's life than the doubt of self-worth.

There is also a material drawback to the quota system. Those who were admitted because of outstanding personal achievement will have a diffucult time convincing prospective employers of this fact. This difficulty would then be used to justify quota requirements for private employers to hire minority group college graduates, I suppose.

Former Justice William O. Douglas, a prominent liberal on the high Court for many years, described the situation well when he said in his dissent in the DeFunis case:

> "A segregated admissions process creates suggestions of stigma and caste no less than a segragated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disproved, that Blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a state is not permitted to place on any lawyer."

While admission to colleges and graduate schools should represent an achievement, a recognition of past excellence, for those who belong to groups which are preferred under affirmative action, there can be no sure sense of accomplishment. Affirmative action purports to produce more blacks and other minorities in the professions and skilled jobs. It cannot, however, guarantee more qualified minorities in the professions or skilled employment.

For reasons such as these, Professor Thomas Sowell has called affirmative action "the noble lie of our times."

The final consideration about affirmative action which this essay will touch upon deals with group responsibility. Quotas, racial "goals and timetables" and other features of affirmative action are defended with the dictum that "the end justifies the means." Reverse discrimination--discrimination against supposed non-minorities (as if everyone did not belong to one minority group or another) for the benefit of other minorities--is permissible under the philosophy which underlies affirmative action. In other chapters in this Report, the dubious accomplishments of affirmative action in increasing black employment and other objectives is discussed. However, I will address the question of the means which are employed.

This essay, as the title indicates, represents only one student's viewpoint. However, it is individuals who are harmed by discrimination, not some nebulous group, no matter how precisely quantified and otherwise defined by the affirmative action advocates. I, as an individual, am being asked to subject myself to stricter scrutiny in applying to law school and the legal profession than are certain other Americans.

While it is true that for many years blacks were victims of unjustifiable racial discrimination in this country, the fact is that individual whites have also been discriminated against on grounds of income, religion and ethnicity. It is clear from the history books, though, that no single group has suffered as much in America as have the black man and woman. It is also undeniable that something must be done to assure that all Americans are given a fair shot at success in this country. Nonetheless, I never discriminated against anyone on account of race or ethnic background in my 22 years of life. Neither did my father or grandfather.

It is a fundamental tenet of Western ethics that the sons should not have to pay for the sins of the fathers. Justice Powell described the practical implication of this principle in his opinion in the Bakke case, when he said that "Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups."

I feel that all Americans have the responsibility—as individuals and as citizens in a common government—to raise the level of opportunity for other citizens, regardless of race. However, I think it is unfair to demand that some pay a very high price in order to grant preferences to certain groups of citizens, some of whom have never suffered from discrimination, while neither they nor any of their forebears directly harmed others on account of race or ethnic background. In my case, and in that of countless other young Americans, my social and economic standing is modest. A cogent argument can hardly be made that I owe wealth or social status to past persecution of blacks or other minority group members.

It is time that we as a people began to pool our resources in order to continue the progress of black and other minority Americans into the mainstream of our society. There is no need to treat people as anything other than as people, with individual merits and faults. There is also no need to harm others in order to better the lot of minorities. The choice is not between groups of Americans or even individual citizens. The challenge is to recognize the immorality of discrimination and to seek ways of bringing our people together and stop pulling them apart.

Clifford J. White III, Chairman of the Task Force, recently graduated with Honors and as a member of Phi Beta Kappa from George Washington University.

AFFIRMATIVE ACTION:
THE STATE OF THE ART IN THE CIVIL SERVICE

by Thomas R. Ascik

All affirmative action programs are unilaterally prohibited by the Civil Rights Act of 1964. This Act, which the Supreme Court finessed in the Bakke decision, is as explicit and thoroughgoing a law as has ever been passed, and was advertised as precisely that during legislative debate; that is, it was intended to abolish forever all considerations of race, color, religion, sex or national origin in employment practices and in college admissions.

In the area of employment, the Act outlawed discrimination "because of" an individual's race, color, religion, sex or national origin. The Act specifically exempted all employers from any requirement to give "preferential treatment" to any individual or group and exempted all employers from any requirements to correct any percentage racial or ethnic imbalances in their work forces. Such considerations, of course, are the heart and soul of affirmative action programs. In addition, the Act prohibited any employer from "limiting, segregating or classifyirg" his employees in any way that would promote discrimination on the basis of race, color, religion, sex or national origin. Later, I will mention the federal government's current practices which ignore this provision.

In 1964, all members of Congress were agreed that the Act did not mandate quotas, goals, timetables or anything of the like. After passage of the Act, President Johnson issued Executive Order 11246. It is from this Executive Order that we get the phrase "affirmative action." The President said that all employers enjoying government contracts must take affirmative action to ensure that employees and applicants are treated "without regard to" race, creed, color, or national origin. So, the Act said no discrimination "because of" race, creed, color, or national origin. President Johnson said it more definitively: "without regard to" the same. Obviously, affirmative action programs do regard race, creed, color, sex, and national origin. Johnson's notion of affirmative action seemed to be this: vigorous efforts to eliminate unjust practices of racial and ethnic discrimination. It did not imply programs intended to correct history. (This is my own definition of affirmative action.) Nevertheless, the social engineering of affirmative action owes its birth, however illegitimate, to this Executive Order. Also, keep in mind that the notion of affirmative action came about through executive edict not through law passed by Congress.

The Equal Employment Opportunity Commission, created by the Civil Rights Act, was not given any powers to enforce the law. Thus, from 1964 to 1972, while the notion of affirmative action was blossoming as public policy, its advocates did not have the muscle and money of the federal government to force affirmative action on

the country, even though some court cases had upheld affirmative action programs. In 1972, however, Congress passed the Equal Employment Opportunity Act, an amendment to Title VII of the Civil Rights Act. This law gave the Equal Employment Opportunity Commission powers of enforcement over all employers with fifteen or more employees. The Commission could bring suits that could result in the awarding of backpay and the ordering of reinstatement and rehiring. The commission could also bring suits against "patterns or practices" of discrimination. However, the EEO Act did not mandate or even recommend affirmative action goals or quotas.

Now for some examples of the current state of the art.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The EEOC has the authority to enforce the Civil Rights Act in the area of employment and, beginning October 1 of this year, will take over enforcement in the government work force through President Carter's Reorganization Plan Number One of 1978. The EEOC is pursuing an aggressive policy of affirmative action under the leadership of its current chairman, Eleanor Holmes Norton. She recently issued new guidelines for the daily operation of the country. Under the law, employers are prohibited from practicing discrimination but they are not required by law to have affirmative action goals, quotas, programs or timetables. Now, of course, most employers have initiated their own programs in order to keep the EEOC off their backs. Ms. Norton's new guidelines seem to require employers to have affirmative action programs. Ms. Norton points out that employers "are obligated to comply with the statute without awaiting the action of any governmental agency." Employers are told that if through "self-analysis" they determine that they might be possible violators, then they are required by the new guidelines to take remedial and/or affirmative action to correct the situation. Thus, it becomes unlawful not only to discriminate but also to have a deficient affirmative action program. And what is an affirmative action program? Mrs. Norton is quite specific:

> ". . . the use of race, color, sex, and ethnic-conscious goals and timetables, ratios, or other numerical remedies intended to remedy the prior discrimination against or exclusion of racial, sexual or ethnic groups or to ensure that the employers' practices presently operate in a non-discriminatory manner. Employers must be attentive to the effect of their employment practices in light of past discrimination by others. Benefits under such remedial and/ or affirmative action programs need not be restricted to identifiable victims of past discrimination by the employer or other persons subject to Title VII."

Thus, all employers of fifteen or more employees are ordered to initiate social programs to seek out the victims of historical discrimination and correct past injustices. By the way, Ms. Norton has many times stated that she is adamantly opposed to quotas.

Under the same guidelines, Ms. Norton intends to head off all reverse discrimination suits. She proclaims that any employer who, after a good-faith self-analysis, has initiated a good-faith affirmative action program, is not liable to any suits of discrimination brought by any employee. Thus, she has codified by regulation those who are the legal victims of discrimination, i.e., the approved list on behalf of whom affirmative action must be carried out. But, no one not on the approved list can claim that they have been victimized by affirmative action. Presumably, she intends to eliminate, by this regulation, the standing in court of those recalcitrants who might think about reverse discrimination suits. Ms. Norton has stated that nothing she is doing is in violation of the Bakke decision. I can't say for sure. But, if the only import of the Bakke decision is that the word "quota" is forbidden, then she is in compliance with the decision because she is very studious about not using that word.

CIVIL SERVICE COMMISSION

The Civil Service Commission under the Carter Administration has become dissatisfied with the pace of affirmative action in the civil service and has decided to speed things up. Currently, there is a pending proposal, known as the Sugarman Plan, named after the resigning vice-chairman of the Commission, Jules Sugarman. The plan calls for the Civil Service Commission to survey various government programs and determine if there is "adverse impact" for women and minorities in any particular field. If the Commission decides that there is adverse impact, it could set aside up to 20 percent of the jobs in each category for "special emphasis" hiring. The whole plan is designed to bring more women and minorities into middle and upper level government jobs by allowing them to bypass regular merit hiring procedures. Under this special hiring plan, minority and women applicants would not have to take regular civil service exams but would be evaluated by a team of experts trained by the Commission. Those who passed muster would be placed in jobs for a probationary period of two years, after which they would be eligible for permanent civil service status.

How would adverse impact be determined? If the representation of women or minorities in any particular employment category did not match the representation of women or minorities in the general population or of women or minorities trained for specific occupational skills, then that employment category would have adverse impact. Mr. Sugarman allows as how sexual, racial and ethnic percentages about employment categories nationwide are not available. So, he proposes to use population percentages, as for example: women make up 51.6 percent of the population, so an employment category would be determined to be adversely impacted if it had less than 51.6 percent women employees. This, of course, takes into consideration only the percent of the

working-age population who are women and does not take into account how much of that percentage wants to work or it seeking work. To his credit, Mr. Sugarman recognizes this discrepancy. That is why he wants to push forward aggressively with the compilation of nationwide sexual, racial and ethnic data for each kind of job in order to make the percentages scientifically sound, and so the government work force will exactly mirror the private work force.

Also, interestingly, Mr. Sugarman is ready to advance the whole affirmative action idea beyond the notion of discrimination. He states: "The determination that there is evidence of adverse impact will be made on the basis of nationwide data. It should not be considered a determination by the Commission that discrimination has, in fact, occurred or affected any individual or group." In other words, discrimination, or even remedies for history, is no longer the issue. The issue becomes a strictly mathematical kind of social engineering.

The Sugarman Plan provoked no little controversy when it was introduced and thus became bogged down earlier this year. Now, it is moving forward to final approval, and Mr. Sugarman has confidently asserted that the plan is fully allowable under the Bakke decision.

Whether the Sugarman Plan is adopted or not, the Civil Service Commission has already begun compiling sexual, racial and ethnic lists. The Commission has felt the need for a statistical analysis of the federal workforce and applicants on sexual, racial and ethnic pedigrees. But until recently such an effort was hampered by one of the Commission's own rules, namely Rule 4.2, which states that "no inquiry shall be made concerning race, political affiliation, or religious belief of any employee, eligible, or applicant." But in September 1976, through a bit of creative legal interpretation, the Commission decided that only hiring officers could make no inquiries about sex, race, or ethnic background of applicants. Officials not involved in hiring could ask such questions. Currently, all those who take the civil service examination are asked to voluntarily fill out a separate form in which they are asked their sex and their racial and ethnic background. Answers to these questions can be traced back to the respondees since each responder is required to put his social security number on the form. It is amusing for the Commission to assert that the data collected will not be used for hiring quotas since there is no other reason for compiling the data. Programming this data into a computer presents all kinds of interesting possibilities. Someone could be selected for hiring or promotion according to specific sexual, racial or ethnic considerations.

What about those already employed by the Commission? They are not being neglected. Many U.S. agencies are updating their secret sexual, racial and ethnic lists they keep on employees to determine how many minorities they think they have on the payroll. Supervisors have been told to make a continuing check of their immediate staff to determine who is what. The supervisory identification program, known in government parlance as "eyeballing," makes the supervisor the complege judge

as to the race and ethnic background of each member of his staff. Presumably, judgement is not needed to determine the sex of each employee. At one time the government tried to have all employees designate their own racial and ethnic backgrounds. But thousands of State Department workers listed themselves as American Indians and Eskimos.

In the Civil Service, the listed categories of people are: black, Hispanic, American Indian, Asian American/Oriental, Aleut in Alaska, Eskimo in Alaska and none of the above.

OTHER CURRENT PRACTICES

-The Rehabilitation Act of 1973 forbids universities and other federal contractors and grant recipients from discriminating against persons with physical and mental handicaps. This year the House had to pass an amendment to the Act to exclude drug addicts and alcholics from protection of the law. The Justice Department had wanted to intervene in a lawsuit of a college teacher who charged his college with discriminating against him because he was an alcoholic.

-The Civil Service Commission has removed from the civil service application the question that asked the applicant whether he is now, or has ever been, a member of the Communist party or any group advocating the overthrow of the American system of constitutional government. This question had discriminated against applicants because of their political affiliation.

-The Civil Service Commission orders remedial courses in human relations for those civil servants who have been found deficient in sexual, racial or ethnic consciousness. This is ordered as a punishment and those so punished must take the courses or be fired. A lawsuit is currently challenging this as an invasion of privacy.

-The Civil Service Commission intends to change the major thrust of its affirmative action programs from affirmative action in hiring and promotion to affirmative action in recruitment. Presumably, this means that they will go out into the countryside specifically recruiting blacks, women or Eskimos.

-The Equal Employment Opportunity Commission intends to seek out targets of opportunity in order to prosecute systematic patterns or practices of discrimination. It would be considered unlawful if an employer had "low utilization of available minorities and women." Again, the state of the art has advanced beyond the notion of discrimination.

-A federal judge has ordered the Library of Congress to set up a fund that its employees can use to hire lawyers or other specialists to help them bring racial discrimination complaints against the agency. This judicial order, a common practice among judges today, is a clear violation of the Constitution because only Congress, according to the Constitution, can expend public funds.

Thomas Ascik is a Policy Analyst for the Heritage Foundation in Washington, D.C. His areas of specialty are social issues. He is a former reporter for the Washington Star.

Highlights of the Task Force-sponsored seminar on
"Affirmative Action and the Bakke Case,"
held on July 19, 1978 in the Rayburn House
Office Building in Washington, D.C.

The panelists were:

-The Honorable Robert Walker (R-PA) serves on Pennsylvania YAF's Advisory Board. He sponsored an anti-racial quota amendment to a Labor-H.E.W. appropriations bill this year. The amendment passed the House and, at the time of the seminar, was pending in the Senate. Representative Walker has been active in civil rights matters since the early 1960's, when he traveled south to join in protest marches against racial discrimination.

-Dr. Walter Williams is professor of economics at Temple University in Philadelphia, Pennsylvania. He is one of the leading black spokesmen against racial quotas and government-imposed economic barriers which discriminate against minority citizens.

-Mr. Thomas Ascik is a Policy Analyst for the Heritage Foundation. His area of specialty includes social issues. He is a former reporter for the Washington Star.

-Louis Wilson Ingram, Esquire is the President of the Foundation for Law and Society. His organization litigates in the public interest.

-Mr. William Gavin was moderator. Currently an aide to Representative Robert Michel (R-ILL), Mr. Gavin was a speech-writer for President Nixon and Senator James L. Buckley.

The following is not an official transcript.

INTRODUCTION

Mr. Gavin: The panel assembled here today is sponsored by Young Americans for Freedom's Task Force on Affirmative Action. The speakers do not necessarily represent the views of the Task Force. A full report on the issue of affirmative action will be released by the Task Force in the fall. Let me begin by saying that I want to reassure all of you that the members of the panel were not chosen according to quota, ratio or equivalent. But in keeping with our subject we do have a goal on timetables. Our goals are to learn all we can about affirmative action. Our timetable is to begin at 3:00 and end somewhere around 4:30.

Five years ago I had the honor of working for Senator James L. Buckley from New York. On May 22, 1973, Senator Buckley inserted into the Congressional Record something I think is probably historic copy. I don't know whether it is the first, but it certainly was at that time the most complete, analysis of the problems of affirmative action. The title of that speech was "What Does Affirmative Action Really Affirm?" In Senator Buckley's conclusion, he said quotas are wrong from the point of view of civil liberties, wrong from the point of view of academic freedom and wrong from the point of view of elementary justice. They are wrong in their essence and their effects. That was five years ago, but during that five years there have been many people who have gone over to Senator Buckley's side who disagreed with him when that speech was made.

Today we have four experts who are going to be looking at almost every aspect of affirmative action. Briefly, from my left, I will introduce two of the speakers. Mr. Thomas Asick is a Public Policy Analyst for the Heritage Foundation. He will discuss affirmative action in the federal government. Next to Mr. Asick is Dr. Walter Williams from Temple University. Dr. Williams is spending the summer at the Heritage Foundation. He will be discussing government-imposed economic barriers that discriminate against minorities. Immediately to my right, Representative Robert Walker, 16th District, Pennsylvania. Last year during the debate on the Labor-HEW appropriation, Congressman Walker stood and introduced an amendment against quotas. This year that same amendment, slightly modified, now called the Walker-Levitas amendment, passed the House by a substantial vote. Congressman Walker will be discussing the legislative prognosis on affirmative action.

And finally, Mr. Albert Ferri, who, until quite recently, was the managing attorney for the Pacific Legal Foundation. He is now Director of National Legal Associates and the author of a "friend of the court" brief on behalf of Allan Bakke. He will discuss the legal aspects of affirmative action. (Editor's note: Mr. Ferri cancelled his appearance, but was replaced by Mr. Ingram.)

Now what I would like to do is turn the microphone over to Dr. Williams. What we are going to do is have Dr. Williams deliver his speech and then, immediately following, answer questions from the floor. Dr. Williams has to leave a little early so we will turn the microphone over now.

Dr. Williams: The U.S. Supreme Court has ruled on the Bakke case. Pro-Bakke and anti-Bakke forces see a victory of sorts; however, neither side is completely satisfied. The entire issue of affirmative action and racial equity is one of considerable confusion. But more important than the confusuion that abounds is the fact that we have people, often former allies, fighting with one another--unnecessarily--when the villain is an "invisible" third party. This invisible villain is more readily seen if we consider other racial quota cases now sitting before the Supreme Court. One case, for example, involves a requirement in the Public Works Employment Act of 1977 that 10 percent of billions of dollars spent under the Act go to minority businessmen in the form of set aside contracts. Many see this as another form of "reverse discrimination" and are questioning its constitutionality.

The approach to the problems of quotas by the Supreme Court, supporters of quotas and opponents of quotas is at best superficial, timid, naive and misguided. The problems that they face have roots far deeper than that perceived by most people - roots reaching to the core of the institutional structure of contemporary America.

First consider a law that plays a significant role in the construction industry - the Davis-Bacon Act. The Davis-Bacon Act of 1931 requires that on all federally funded (or assisted) construction projects the workers be paid the "prevailing wage." The Secretary of Labor, who is charged with making the determination, contrary to the law, interprets the prevailing wage as the union wage or higher. One of the effects of the Davis-Bacon Act is that of discriminating against non-union contractors. It accomplishes this result by preventing non-union contractors from engaging in price competition with unionized contractors. To the extent that non-union contractors are discouraged from competition on a substantial part of the construction market, it has economic consequences for minority contractors and minority construction workers who are overwhelmingly in the non-union sector of the construction industry.

The racial effects of the Davis-Bacon Act were anticipated by its designers. Allusions to racial bigotry were made in many speeches during the House debate. Congressman Allgood said: "That contractor has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country." (U.S. Congress, House, Congressional Record, 71st Congress, 3rd session, 1931, p. 6513.) Therefore, at least one of the original intents of the Davis-Bacon Act was to prevent black construction workers from competing with white construction workers on remunerative federal construction projects.

Another law related to the construction industry is national labor law which creates union monopoly in the labor market. In the commercial sector of the contract construction industry, it is virtually impossible to become employed unless you are a union member or a person acceptable to a union. History, past and current, is rife with union collusion against minorities. Therefore, a requirement for union membership, as a condition of employment, often results in discrimination against minorities because they are not permitted equal rights. When they are admitted, seniority rules guarantee the permanence of past discrimination.

It would seem that people who hold democratic values and find racial or sexual group membership obnoxious as a criteria for employment might examine whether any group, labor or professional, is a suitable substitute. If we agree, or continue to permit, the union group membership as a suitable criteria for employment and union membership rights are determined by the personal characteristics of the worker, than indeed we have a dilemma. To ensure blacks equality of opportunity we have to eliminate this criteria to let all compete for jobs or take the second-best approach to employment opportunity - racial quotas. I prefer the first - free competition for all.

Employment is not the only area rigged against minorities. Business opportunities are as well. For example, a black, and for that matter anyone else, cannot enter the business of interstate trucking promising only to provide better services and cheaper prices. The Interstate Commerce Commission, a federal regulatory agency, which represents the interests of the trucking industry and Teamsters, usually will not grant authorization. It does this to protect, not the economic interests of the public, but the interests of incumbent practitioners. In other words, in this and many other areas of economic life the government grants some citizens privileges and denies them to others.

Previous discriminated, despised minorities did not confront the barriers to entry that blacks and Hispanics face. One of the most overlooked differences between say, Italians, and blacks is that when blacks became franchised there were many laws which barred entry and stood in the way of upward mobility from ghettos. Other ethnic groups could, for example, print the word TAXI on their auto and be in business. Today more than paint and determination is needed. In New York to own and operate a cab requires the purchase of a $52,000 license. Past minorities had only to satisfy customers. This option is severely constrained today.

The problem that blacks face today, for the most part, has little to do with current racial discrimination. Blacks today need what other minorities had - greater opportunity to enter and compete in the marketplace. We need government to get off their backs and be able to compete in the marketplace on equal footing, just as all other people have in the past. We have many, many laws that prevent minorities from competing on equal footing such as minorities of the past have done. Thank you.

Questions and Answers

Mr. Gavin: Now as I said before we will take a break and you can direct your questions directly to Dr. Williams.

Question: How does affirmative action impact on black teenage unemployment?

Dr. Williams: Most Americans are fully aware of the unemployment problems that most blacks face today. They are fully aware that black teenagers face an unemployment rate of three and four times that of white teenagers. What most Americans do not realize is that in 1948, for example, black teenagers had an unemployment rate of 9.2 percent, and white teenagers had an unemployment rate of 10.4 percent. All that has been reversed since 1948. How do you explain that dramatic reversal now where black teenage unemployment is much higher than white teenage unemployment? Is it that society is more racist now, or racially discriminatory now than in 1948? Or would you explain it that blacks were more highly qualified than whites in 1948? No. The statistical evidence gathered by economists shows that with each increase in the minimum wage law, and with each increase in the extent of coverage of the minimum wage law, black teenage unemployment rose relative to white teenage unemployment. The minimum wage law was an effective way to price blacks out of the market. White racist unions in South Africa are the most ardent supporters of the equal pay for equal work laws for blacks in that country. The point that I am making here is that in terms of people caring for blacks, and trying to help blacks, they have in fact through many of their measures made blacks worse off than they would have been if we had just opened up market opportunities for blacks.

Question: Aren't blacks underrepresentated in many jobs?

Dr. Williams: Only 35 percent of NBA basketball players are white, so forget about numbers. . .

Well. I think that affirmative action involves looking at numbers as a measure of opportunity. I think that affirmative action may represent man's arrogance in thinking that he can engineer society. I think that numbers or percentages don't count very much. It's very interesting that if you go through the number of Nobel Prize winners in our country, Jews represent 27 percent of all American Nobel Prize winners. The fact that you have the numbers that are "out of proportion" just doesn't necessarily mean that one group is exercising conspiracy against the other group in our country. But again I think you are correct in some respects. I think that it is arrogance in man to think he can solve every problem in our society.

Question: How do you view busing for purposes of racial balance?

Dr. Williams: All of the empirical evidence on busing shows that it does not produce the results that the supporters of busing hoped that it would produce. In fact it shows that there have been some negative affects on

minorities as a result of busing. In other words you bring children from very, very deprived backgrounds in inner cities and you take them out to the suburbs. I can't think of a better way to produce insecurity than in the sense of non-self-worth. I think also that busing makes the assumption that a black child cannot achieve academic excellence unless we go out and capture a white kid for him to sit beside. I think that is a racial insult. I think that black academic excellence has been produced in all-black schools. We have a school, Paul Lawrence Dunbar in Washington, that has produced most of the nation's black elite in our country for a long time. We have PS-91 that is a ghetto school and the children there are reading one to two years above the national average. Black Muslim schools have children that do very very well. I do not believe that integration is a necessary condition for black academic excellence. I think that high quality teachers, dedicated students and dedicated parents are the ingredients, not integration. I'm not against integration. But, I'm saying that in the effort to achieve integration in many schools, we are not achieving quality education. Furthermore, many studies have shown that with busing there isn't any integration because there are separate bathrooms for the black kids and separate bathrooms for the white kids. They segregate themselves by having their own section of the lunch room, water fountains and separate exits from the building. So I sympathize with most black parents, and polls show that most black parents are against busing for purposes of racial integration.

Representative Walker: I am pleased to be here today to discuss a subject that has great social and legal ramifications for our nation and a subject that I have been actively involved with since coming to Congress.

Much has been accomplished by past Congresses in the effort to rid our nation of discrimination based on the color of a person's skin, his ethnic origin, or his sex. No one can or should quarrel with legitimate efforts to make equal opportunity a reality.

Unfortunately, out of the passion that generated initiatives to guarantee the civil rights of all Americans and to ensure equal treatment for everyone in schools, in the job market, and throughout society, there has arisen an effort to remedy old wrongs with new wrongs. Ironically, this effort is characterized by the use of a tool which opponents of discrimination fought for years. The tool is quotas.

Numerical quotas, applied as a hiring or admissions tool, are discriminatory by definition. Allowing only a certain number of whites, blacks, Chicanos, Aleuts, women, Jews, Protestants, Roman Catholics, or lefthanded plumbers to have a job or to enter college is the antithesis of equal opportunity for all. Selection of a certain number of people from a designated (and favored) group while excluding others who may merit selection is flagrant discrimination.

Presently, our federal bureaucracy, with the approval of Congress, uses quotas to enforce civil rights legislation. This is done in spite of the fact that the original law (the Civil Rights Act of 1964) and subsequent executive orders (Executive Order 11375, issued by President Johnson in 1965, which used the phrase "affirmative action" for the first time) do not mention quotas, and legislative history clearly intended to prohibit them. I think this provides us with a lesson in the internal workings of the bureaucracy and the lack of Congressional concern over administrative rulemaking. Just recently, Eleanor Holmes Norton, Chairman of the Equal Employment Opportunity Commission, stated in a speech before the annual convention of the NAACP that, "after a careful reading of Bakke, we at EEOC have concluded that we can continue to use numerical remedies, and I promise you we will continue to use them. . .we believe numerical remedies, including quotas under certain circumstances, are still permissible, and we will not stop using them unless the courts tell us we must."

Other government officials, however, will not admit to enforcing quotas. The Secretary of HEW blandly suggests his agency is promoting "goals" with accompanying timetables. Others state evasively that some type of "numerical requirement" must be levied on schools and contractors to measure progress in affirmative action but quotas would be taboo. It does not matter, however, what euphemism is used by which government official; the only logical conclusion that can be drawn from the real action of federal officials is the raw fact that the government enforces quotas.

Clearly, something must be done to rescue a nobel cause gone awry. Guaranteeing an end to discrimination and providing equal opportunity for all people are absolute necessities if our country is to be true to its ideas and its

founding principles. Prejudice, unfortunately, may continue to live in the emotions of some people, but it should not be given the sanction of law where reason must prevail. However, the desire to combat prejudice and to eliminate discrimination must not become a punitive mission using discriminatory tactics. It seems to me that this is precisely the conclusion reached by the Supreme Court in its decision on the Bakke case. By telling applicants who are not Black, Asian or Chicano that they are totally excluded from a specific percentage of the seats in an entering class, the University of California at Davis disregarded the constitutional guarantee of individual rights.

Taking positive steps to guarantee that previously under-qualified minorities and women have the opportunity to compete equally with their peers without facing the specter of discrimination was the true intention of the civil rights movement. The opportunity to compete on equal footing and to be judged on individual merit is an American ideal.

Therefore, those of us who favor equal opportunity and an end to discrimination but oppose quota systems have a responsibility to discuss alternatives that guarantee access to education, employment and housing for minorities and women. One of these alternatives, and perhaps one of the most difficult tasks to accomplish, is the upgrading of elementary and secondary schools which have traditionally enrolled substantial members of minority students. All children in this country should receive a quality basic education which prepares them to become productive citizens.

Because of the long-term aspects of this, short-term alternatives are needed, and in this regard some colleges and universities have begun "outreach" program which seek to bring more qualified minority students into their student bodies. Employers might consider a similar type of outreach program for disadvantaged persons seeking to break into skilled jobs. Special apprentice or trainee positions could be made available to help ensure that potential employees had the opportunity to gain training that will bring their skills up to a useful level.

Assessing whether good-faith efforts are being made to eliminate discrimination does not require quotas. I am convinced that quotas are being used by bureaucrats and, in the Bakke case, by the University of California at Davis, as a matter of convenience. It is easier for them to compare percentages and total numbers than to review and analyze total programs. This is most unfortunate since it reinforces the widely held view that the bureaucracy is impersonal, unfeeling and enamored of numbers. More importantly, it reveals a certain insensitivity of the bureaucracy to the real problems all Americans have in acquiring an education and a job.

As it does on other controversial issues, Congress seems to be allowing the courts to render final decision on the subject of quotas. The recent decision by the Supreme Court in favor of Mr. Bakke firmly establishes, however, the legal foundation for legislative action against "reverse discrimination." Congress cannot continue to look the over way and wait for the courts or the President to solve the problem. A Gallup Poll taken last fall shows that 80 percent of the U.S. public, including women and minorities, opposes quotas

and preferential treatment as methods of correcting past discrimination. The will of the people is clearly involved and Congress is charged with the responsibility to act on behalf of the people.

Congressman Elliott Levitas and I recently offered an anti-quota amendment to the Labor-HEW appropriations bill. The House of Representatives passed that amendment by a vote of 232 to 177. Congressman Levitas and I have now called on the Senate to take the same favorable action and once and for all go on record against discriminatory quotas and in favor of equal rights under the law for every American. We have also introduced a bill (H.R. 9286) to prohibit all federal agencies from enforcing quotas.

As I mentioned at the outset, the quotas issue involves serious matters with great legal and social ramifications. Our educational system is affected. Our employment practices and the workplace are touched by the issue. Perhaps more important, people's relationships with one another are tied to the quota issue. The Bakke decision is a strong statement in support of affirmative action without quotas and underscores the need for Congressional action on this serious and political issue.

Are Quotas Good for Blacks?

Thomas Sowell

RACE has never been an area noted for rationality of thought or action. Almost every conceivable form of nonsense has been believed about racial or ethnic groups at one time or another. Theologians used to debate whether black people had souls (today's terminology might suggest that *only* black people have souls). As late as the 1920's, a leading authority on mental tests claimed that test results disproved the popular belief that Jews are intelligent. Since then, Jewish IQ's have risen above the national average and more than one-fourth of all American Nobel Prize-winners have been Jewish.

Today's grand fallacy about race and ethnicity is that the statistical "representation" of a group —in jobs, schools, etc.—shows and measures *discrimination*. This notion is at the center of such controversial policies as affirmative-action hiring, preferential admissions to college, and public-school busing. But despite the fact that far-reaching judicial rulings, political crusades, and bureaucratic empires owe their existence to that belief, it remains an unexamined assumption. Tons of statistics have been collected, but only to be interpreted in the light of that assumption, never to test the assumption itself. Glaring facts to the contrary are routinely ignored. Questioning the "representation" theory is stigmatized as not only inexpedient but immoral. It is the noble lie of our time.

AFFIRMATIVE-ACTION HIRING. "Representation" or "underrepresentation" is based on comparisons of a given group's percentage in the population with its percentage in some occupation, institution, or activity. This might make sense if the various ethnic groups were even approximately similar in age distribution, education, and other crucial variables. But they are not.

Some ethnic groups are a whole decade younger than others. Some are two decades younger. The average age of Mexican Americans and Puerto Ricans is under twenty, while the average age of Irish Americans or Italian Americans is over thirty —and the average age of Jewish Americans is over forty. This is because of large differences in the number of children per family from one group to another. Some ethnic groups have more than twice as many children per family as others. Over half of the Mexican American and Puerto Rican population consists of teenagers, children, and infants. These two groups are likely to be underrepresented in any adult activity, whether work or recreation, whether controlled by others or entirely by themselves, and whether there is discrimination or not.

Educational contrasts are also great. More than half of all Americans over thirty-five of German, Irish, Jewish, or Oriental ancestry have completed at least four years of high school. Less than 20 per cent of all Mexican Americans in the same age bracket have done so. The disparities become even greater when you consider quality of school, field of specialization, postgraduate study, and other factors that are important in the kind of high-level jobs on which special attention is focused by those emphasizing representation. Those groups with the most education—Jews and Orientals—also have the highest quality education, as measured by the rankings of the institutions from which they receive their college degrees, and specialize in the more difficult and remunerative fields, such as science and medicine. Orientals in the United States are so heavily concentrated in the scientific area that there are more Oriental scientists than there are black scientists in absolute numbers, even though the black population of the United States is more than twenty times the size of the Oriental population.

Attention has been focused most on high-level positions—the kind of jobs people reach after years of experience or education, or both. There is no way to get the experience or education without also growing older in the process, so when we are talking about top-level jobs, we are talking about the kind of positions people reach in their forties and fifties rather than in their teens and twenties. Representation in such jobs cannot be compared to representation in a population that includes many five-year-olds—yet it is.

The general ethnic differences in age become extreme in some of the older age brackets. Half of the Jewish population of the United States is for-

THOMAS SOWELL is professor of economics at the University of California at Los Angeles and the author of, among other works, *Classical Economics Reconsidered*, *Race and Economics*, and *Black Education: Myths and Tragedies*.

ty-five years old or older, but only 12 per cent of the Puerto Rican population is that old. Even if Jews and Puerto Ricans were identical in every other respect, and even if no employer ever had a speck of prejudice, there would still be huge disparities between the two groups in top-level positions, just from age differences alone.

Virtually every underrepresented racial or ethnic group in the United States has a lower than average age and consists disproportionately of children and inexperienced young adults. Almost invariably these groups also have less education, both quantitatively and qualitatively. The point here is not that we should "blame the victim" or "blame society." The point is that we should, first of all, *talk sense*! "Representation" talk is cheap, easy, and misleading; discrimination and opportunity are too serious to be discussed in gobbledygook.

THE idea that preferential treatment is going to "compensate" people for past wrongs flies in the face of two hard facts:

1. Public-opinion polls have repeatedly shown most blacks opposed to preferential treatment either in jobs or college admissions. A Gallup Poll in March 1977, for example, found only 27 per cent of non-whites favoring "preferential treatment" over "ability as determined by test scores," while 64 per cent preferred the latter and 9 per cent were undecided. (The Gallup breakdown of the U.S. population by race, sex, income, education, etc. found that "not a single population group supports affirmative action."*)

How can you compensate people by giving them something they have explicitly rejected?

2. The income of blacks relative to whites reached its peak *before* affirmative-action hiring and has *declined* since. The median income of blacks reached a peak of 60.9 per cent of the median income of whites in 1970—the year before "goals" and "timetables" became part of the affirmative-action concept. "In only one year of the last six years," writes Andrew Brimmer, "has the proportion been as high as 60 per cent."†

Before something can be a "compensation," it must first be a benefit.

The repudiation of the numerical or preferential approach by the very people it is supposed to benefit points out the large gap between illusion and reality that is characteristic of affirmative action. So does the cold fact that there are few, if any, benefits to offset all the bitterness generated by this heavy-handed program. The bitterness is largely a result of a deeply resented principle, galling bureaucratic processes, and individual horror stories. Overall, the program has changed little for minorities or women. Supporters of the program try to cover up its ineffectiveness by comparing the position of minorities today with their position many years ago. This ignores all the progress that took place under straight equal-treatment laws in the 1960's—progress that has not continued at anywhere near the same pace under affirmative action.

Among the reasons for such disappointing results is that hiring someone to fill a quota gets the government off the employer's back for the moment, but buys more trouble down the road whenever a disgruntled employee chooses to go to an administrative agency or a court with a complaint based on nothing but numbers. Regardless of the merits, or the end result, a very costly process for the employer must be endured, and the threat of this is an incentive *not* to hire from the groups designated as special by the government. The affirmative-action program has meant mutually canceling incentives to hire and not to hire—and great bitterness and cost from the process, either way.

IF BLACKS are opposed to preferential treatment and whites are opposed to it, who then is in favor of it, and how does it go on? The implications of these questions are even more far-reaching and more disturbing than the policy itself. They show how vulnerable our democratic and constitutional safeguards are to a relative handful of determined people. Some of those people promoting preferential treatment and numerical goals are so convinced of the rightness of what they are doing that they are prepared to sacrifice whatever needs to be sacrificed—whether it be other people, the law, or simple honesty in discussing what they are doing (note "goals," "desegregation," and similar euphemisms). Other supporters of numerical policies have the powerful drive of self-interest as well as self-righteousness. Bureaucratic empires have grown up to administer these programs, reaching into virtually every business, school, hospital, or other organization. The rulers and agents of this empire can order employers around, make college presidents bow and scrape, assign schoolteachers by race, or otherwise gain power, publicity, and career advancement—regardless of whether minorities are benefited or not.

While self-righteousness and self-interest are powerful drives for those who have them, they can succeed only insofar as other people can be persuaded, swept along by feelings, or neutralized. Rhetoric has accomplished this with images of historic wrongs, visions of social atonement, and a horror of being classed with bigots. These tactics

* Gallup Opinion Index, June 1977, Report 145, p. 23.

† *Black Enterprise*, April 1978, p. 62. A newly released RAND study similarly concludes that very little credit should be given to government affirmative-action programs for any narrowing of the income gap between white and black workers. The RAND researchers write, "our results suggest that the effect of government on the aggregate black-white wage ratio is quite small and that the popular notion that . . . recent changes are being driven by government pressure has little empirical support" (New York *Times*, May 8, 1978).

have worked best with those most affected by words and least required to pay a price personally: non-elected judges, the media, and the intellectual establishment.

The "color-blind" words of the Civil Rights Act of 1964, or even the protections of the Constitution, mean little when judges can creatively reinterpret them out of existence. It is hard to achieve the goal of an informed public when the mass media show only selective indignation about power grabs and a sense of pious virtue in covering up the failures of school integration. Even civil libertarians—who insist that the Fifth Amendment protection against self-incrimination is a sacred right that cannot be denied Nazis, Communists, or criminals—show no concern when the government routinely forces employers to confess "deficiencies" in their hiring processes, without a speck of evidence other than a numerical pattern different from the government's preconception.

PREFERENTIAL ADMISSIONS. Preferential admissions to colleges and universities are "justified" by similar rhetoric and the similar assumption that statistical underrepresentation means institutional exclusion. Sometimes this assumption is buttressed by notions of "compensation" and a theory that (1) black communities need more black practitioners in various fields; and that (2) black students will ultimately supply that need. The idea that the black community's doctors, lawyers, etc. should be black is an idea held by white liberals, but no such demand has come from the black community, which has rejected preferential admissions in poll after poll. Moreover, the idea that an admissions committee can predict what a youth is going to do with his life years later is even more incredible—even if the youth is one's own son or daughter, much less someone from a wholly different background.

These moral or ideological reasons for special minority programs are by no means the whole story. The public image of a college or university is often its chief financial asset. Bending a few rules here and there to get the right body count of minority students seems a small price to pay for maintaining an image that will keep money coming in from the government and the foundations. When a few thousand dollars in financial aid to students can keep millions of tax dollars rolling in, it is clearly a profitable investment for the institution. For the young people brought in under false pretense, it can turn out to be a disastrous and permanently scarring experience.

The most urgent concern over image and over government subsidies, foundation grants, and other donations is at those institutions which have the most of all these things to maintain—that is, at prestigious colleges and universities at the top of the academic pecking order. The Ivy League schools and the leading state and private institutions have the scholarship money and the brand-name visibility to draw in enough minority youngsters to look good statistically. The extremely high admissions standards of these institutions usually cannot be met by the minority students—just as most students in general cannot meet them. But in order to have a certain minority body count, the schools bend (or disregard) their usual standards. The net result is that thousands of minority students who would normally qualify for good, non-prestigious colleges where they could succeed, are instead enrolled in famous institutions where they fail. For example, at Cornell during the guns-on-campus crisis, fully half of the black students were on academic probation, despite easier grading standards for them in many courses. Yet these students were by no means unqualified. Their average test scores put them in the top quarter of all American college students—but the other Cornell students ranked in the top *1 per cent*. In other words, minority students with every prospect of success in a normal college environment were artificially turned into failures by being mismatched with an institution with standards too severe for them.

When the top institutions reach further down to get minority students, then academic institutions at the next level are forced to reach still further down, so that they too will end up with a minority body count high enough to escape criticism and avoid trouble with the government and other donors. Each academic level, therefore, ends up with minority students underqualified for that level, though usually perfectly qualified for some other level. The end result is a systematic mismatching of minority students and the institutions they attend, even though the wide range of American colleges and universities is easily capable of accommodating those same students under their normal standards.

Proponents of "special" (lower) admissions standards argue that without such standards no increase in minority enrollment would have been possible. But this blithely disregards the fact that when more *money* is available to finance college, more low-income people go to college. The GI Bill after World War II caused an even more dramatic increase in the number of people going to college who could never have gone otherwise—and without lowering admissions standards. The growth of special minority programs in recent times has meant both a greater availability of money and lower admissions standards for black and other designated students. It is as ridiculous to ignore the role of money in increasing the numbers of minority students in the system as a whole as it is to ignore the effect of double standards on their maldistribution among institutions. It is the double standards that are the problem, and they can be ended without driving minority students out of the system. Of course, many academic hustlers who administer special programs might lose

their jobs, but that would hardly be a loss to anyone else.

As long as admission to colleges and universities is not unlimited, someone's opportunity to attend has to be sacrificed as the price of preferential admission for others. No amount of verbal sleight-of-hand can get around this fact. None of those sacrificed is old enough to have had anything to do with historic injustices that are supposedly being compensated. Moreover, it is not the offspring of the privileged who are likely to pay the price. It is not a Rockefeller or a Kennedy who will be dropped to make room for quotas; it is a De Funis or a Bakke. Even aside from personal influence on admissions decisions, the rich can give their children the kind of private schooling that will virtually assure them test scores far above the cut-off level at which sacrifices are made.

Just as the students who are sacrificed are likely to come from the bottom of the white distribution, so the minority students chosen are likely to be from the top of the minority distribution. In short, it is a forced transfer of benefits from those least able to afford it to those least in need of it. In some cases, the loose term "minority" is used to include individuals who are personally from more fortunate backgrounds than the average American. Sometimes it includes whole groups, such as Chinese or Japanese Americans, who have higher incomes than whites. One-fourth of all employed Chinese in this country are in professional occupations—nearly double the national average. No amount of favoritism to the son or daughter of a Chinese doctor or mathematician today is going to compensate some Chinese of the past who was excluded from virtually every kind of work except washing clothes or washing dishes.

The past is a great unchangeable fact. *Nothing* is going to undo its sufferings and injustices, whatever their magnitude. Statistical categories and historic labels may seem real to those inspired by words, but only living flesh-and-blood people can feel joy or pain. Neither the sins nor the sufferings of those now dead are within our power to change. Being honest and honorable with the people living in our own time is more than enough moral challenge, without indulging in illusions about rewriting moral history with numbers and categories.

SCHOOL BUSING. It is chilling to hear parents say that the worst racists they know are their own children. Yet such statements have been made by black and white parents, liberals and conservatives, and without regard to geographical location. It is commonplace to hear of integrated schools where no child of either race would dare to enter a toilet alone. The fears and hatreds of these schoolchildren are going to be part of the American psyche long after the passing of an older generation of crusading social experimenters. It is quite a legacy to leave.

The ringing principles of equal rights announced in the 1954 Supreme Court decision in *Brown* v. *Board of Education* have been transformed by twenty years of political and judicial jockeying into a nightmare pursuit of elusive statistical "balance." The original idea that the government should not classify children by race was turned around completely to mean that the government must classify children by race. The fact that the racial integration of youngsters from similar backgrounds has worked under voluntary conditions was seized upon as a reason for forcing statistical integration of schoolchildren, without regard to vast contrasts of income, way of life, or cultural values. Considerations of cost, time, feelings, or education all give way before the almighty numbers. As more and more evidence of negative consequences to the children has piled up, the original notion that this was going to benefit somebody has given way to the idea that "the law of the land" has to be carried out, even if the skies fall. Less grandly, it means that judges cannot back off from the can of worms they have opened, without admitting that they have made asses of themselves.

The civil-rights establishment has a similar investment of ego and self-interest to protect. The NAACP Legal Defense Fund now insists that the issue is not "educational" but "constitutional." This might be an understandable position for an academic association of legal theorists, but not for an organization claiming to speak in the name of flesh-and-blood black people—people who reject busing in nationwide polls and who reject it by large majorities in cities where it has been tried. The head of the NAACP Legal Defense Fund brushes this aside by saying that they cannot ask "each and every black person" his opinion before proceeding, but the real question is whether they can consistently go counter to the majority opinions of the very people in whose name they presume to speak.

The tragic Boston busing case shows all these institutional ego forces at work. Local black organizations urged Judge Garrity *not* to bus their children to South Boston, where educational standards were notoriously low and racial hostility notoriously high. Both the NAACP and the judge proceeded full-speed-ahead anyway. Black children were forced to run a gauntlet of violence and insults for the greater glory of institutional grand designs. In Detroit, Atlanta, and San Francisco the NAACP also opposed local blacks on busing—including local chapters of its own organization in the last two cities. The supreme irony is that Linda Brown, of *Brown* v. *Board of Education*, has now gone into court to try to keep her children from being bused.

That "a small band of willful men" could inflict this on two races opposed to it is a sobering commentary on the fragility of democracy. Moreover, what is involved is not merely mistaken zealotry.

What is involved is an organization fueled by money from affluent liberals whose own children are safely tucked away in private schools, and a crusade begun by men like Thurgood Marshall and Kenneth B. Clark whose own children were also in private schools away from the storms they created for others. The very real educational problems of black children, and the early hopes that desegregation would solve them, provided the impetus and the support for a crusade that has now degenerated into a numerical fetish and a judicial unwillingness to lose face. What actually happens to black children, or white children, has been openly relegated to a secondary consideration in principle, and less than that in practice.

The 1954 *Brown* decision did not limit itself to ruling that it is unconstitutional for a state to segregate by race. It brought in sociological speculation that separate schools are inherently inferior. Yet within walking distance of the Supreme Court was an all-black high school whose eighty-year history would have refuted that assumption—if anyone had been interested in facts. As far back as 1939, the average IQ at Dunbar High School was 11 per cent above the national average—fifteen years before the Court declared this impossible. The counsel for the NAACP in that very case came from a similar quality all-black school in Baltimore. There are, and have been, other schools around the country where black children learned quite well without white children (or teachers) around, as well as other schools where each race failed to learn, with or without the presence of the other. The most cursory look at the history of all-Jewish or all-Oriental schools would have reduced the separate-is-inferior doctrine to a laughingstock instead of the revered "law of the land."

The Court's excursion into sociology came back to haunt it. When the end of state-enforced segregation did not produce any dramatic change in the racial makeup of neighborhood schools, or any of the educational benefits anticipated, the civil-rights establishment pushed on for more desegregation—now stretched to mean statistical balance, opposition to ability grouping, and even the hiring and assignment of teachers by race. If the magic policy of integration had not worked, it could only be because there had not yet been enough of it! Meanwhile, the real problems of educating real children were lost in the shuffle.

However futile the various numerical approaches have been in their avowed goal of advancing minorities, their impact has been strongly felt in other ways. The message that comes through loud and clear is that minorities are losers who will never have anything unless someone gives it to them. The destructiveness of this message—on society in general and minority youth in particular—outweighs any trivial gains that may occur here and there. The falseness of the message is shown by the great economic achievements of minorities during the period of equal-rights legislation before numerical goals and timetables muddied the waters. By and large, the numerical approach has achieved nothing, and has achieved it at great cost.

Underlying the attempt to move people around and treat them like chess pieces on a board is a profound contempt for other human beings. To ignore or resent people's resistance—on behalf of their children or their livelihoods—is to deny our common humanity. To persist dogmatically in pursuit of some abstract goal, without regard to how it is reached, is to despise freedom and reduce three-dimensional life to cardboard pictures of numerical results. The false practicality of results-oriented people ignores the fact that the ultimate results are in the minds and hearts of human beings. Once personal choice becomes a mere inconvenience to be brushed aside by bureaucrats or judges, something precious will have been lost by all people from all backgrounds.

A multi-ethnic society like the United States can ill-afford continually to build up stores of intergroup resentments about such powerful concerns as one's livelihood and one's children. It is a special madness when tensions are escalated between groups who are basically in accord in their opposition to numbers games, but whose legal establishments and "spokesmen" keep the fires fueled. We must never think that the disintegration and disaster that has hit other multi-ethnic societies "can't happen here." The mass internment of Japanese Americans just a generation ago is a sobering reminder of the tragic idiocy that stress can bring on. We are not made of different clay from the Germans, who were historically more enlightened and humane toward Jews than many other Europeans until the generation of Hitler and the Holocaust.

The situation in America today is, of course, not like that of the Pearl Harbor period, nor of the Weimar republic. History does not literally repeat, but it can warn us of what people are capable of, when the stage has been set for tragedy. We certainly do not need to let emotionally combustible materials accumulate from ill-conceived social experiments.

Reprinted from Commentary, by permission; copyright (c) 1978 by the American Jewish Committee

PART II:

LEGAL ASPECTS OF AFFIRMATIVE ACTION

The Indecision on Bakke

by Marco De Funis

The long awaited Bakke decision finally was rendered this June 28th. The U.S. Supreme Court opened the doors to the Davis Medical School to Allan Bakke. That decision of the United States Supreme Court should have laid many of the issues relating to affirmative action to rest. Instead, new rounds of litigation will have to come to grips with the invasion of individual liberty perpetrated by affirmative action programs on applicants for medical school, law school and employment.

The sharply divided court could barely muster a majority of votes permitting Bakke to go to medical school and striking down the admissions program at the University of California at Davis. The swing vote of Justice Powell provided a majority ruling that race does not have to be ignored in the admissions selection process.

It is not safe to draw many further implications from the Bakke decision. The division of opinion and lack of definitive statement on many pressing collateral issues prevent it from being a definitive landmark decision. It now appears to be an invitation for further litigation.

Allan Bakke, now 38 years old, sued to obtain admission to the University of California Medical School at Davis, claiming he was displaced by 16 minority students with grades, admission test scores, and total admission point scores far lower than his. He based his claim on the 14th Amendment to the United States Constitution as well as civil rights legislation which together prohibited the University from treating him any different from the minority applicants. He claimed his civil right to be treated as an individual was violated by the medical school's race-conscious admissions program. The Davis Medical School utilized a special admissions process for "selected minorities" (Blacks, Chicanos, Native Americans and Filipinos) and reserved 16 seats for these minorities who had also been determined to be "underprivileged." The schools's practice was considered by many commentators to be a form of racial quota, prohibited by the Constitution. In fact, the race-conscious admissions process posed a real danger by setting forth two standards, one for minorites and one for non-minorities.

Justices Stevens, Rehnquist, Stewart, and Chief Justice Burger ruled that the Davis Medical School admission program violated Title 6 of the 1964 Civil Rights Act and that Bakke was entitled to admission because of then unlawful discrimination which caused his exclusion. Their decision was based only on the factual record involving the University of California at Davis and did not profess either support or criticism of any other admissions program. They stated on the first part of their decision, "This is not a class action. The controversy is between two specific litigants. . . .If the (California Supreme Court) was correct in its view that the University's special admissions program was illegal, and that Bakke was unlawfully excluded from the school because of his race, we should affirm its judgement, regardless of our views about the legality of admissions programs that are not now before the court." These justices apparently referred to Justice Powell's approval of the Harvard Plan which takes race into consideration as one element of the individual's total background.

The above four justices made a very narrow ruling on the grounds of a statute or law passed by Congress rather than the Constitution, on the premise that the court does not pass or rule on matters of constitutional law unless such adjudication is unavoidable. Because four of the justices felt that the Civil Rights Act was enough to void the Davis Medical School's admissions process and permit Bakke to go to medical school, there is no majority ruling that such a program is constitutionally impermissible.

Justice Powell is the swing vote in the Bakke decision. He goes much further than his four brethren in permitting Bakke to be admitted to medical school by finding that the Davis Medical School admissions program violates the U.S. Constitution. Yet he swings over to the other side and permits the Davis Medical School to consider race as one element in the admissions selections process.

The net effect of Justice Powell's swing vote is to strike down the admissions system based on a numerical racial quota and raise questions about all other affirmative action programs where race is considered. Affirmative action programs which try to implement goals, projections, and quotas for selected minorities based upon race should be successfully challenged under Bakke, at least where there has been no past discriminatory conduct by the institution or public body implementing the program and the program can be construed as being based primarily on race.

Justice Powell's decision also seems to approve of admissions programs such as the Harvard Medical School's plan which allegedly considers race as only "one element" of an applicant's characteristics. The problem with such a ruling is that race can be the deciding characteristic even though it might have no relevance to the applicant's abilities or his or her contribution to the medical school class. The fact that race is merely an accident of birth that in and of itself carries no significance is undisputed. It is only if people are truly evaluated and judged as individuals does the Powell opinion make any sense, for then race will be considered and found to be totally insignificant. Neutral, not race-conscious, criteria should be used. Whites, blacks, Chicanos and members of other racial and religious groups should be considered individually for what they can do. Race does not make a basketball player or a football player an all-American; neither does it qualify anyone for medical school. The same standards ought to be used in evaluating all applicants; and those same standards ought to be task oriented, and correlated with professional or job performance.

Justice Powell's opinion is very narrow in scope and does not sanction race-conscious selection processes that use race directly or indirectly as the sole determinant of who secures the position. Justice Powell discusses the traditions of academic freedom and the discretion of admission committees and apparently would limit his opinion to such a setting. Justice Powell indicates that race may be considered in some way in obtaining a diverse student body but at the same time urges that the individual be considered on his individual merits so that the applicant is being selected for his unique combination of skills, abilities, and experiences, and not merely as a member of a racial group. The policy of diversity espoused by Justice Powell clearly has no place in the employment sector, and thus Bakke may have a more substantial impact in that area.

Justice Powell's opinion raises some serious questions: Who will decide if race is relevant to an applicant's admission? Can race be used to exclude an applicant from admission? Can race alone serve as the decisive factor in admissions? Must the last available seat be reserved for a minority applicant? These and other questions will have to be answered by further litigation. If race can be considered, then how is it to be considered, to what extent and in what settings? Powell's opinion gives little guidance and seemingly attempts to force the courts into a case by case analysis.

Where there are clear, overt policies of numerical racial preferences, Bakke easily disposes of the situation. Where race alone is not considered, the admissions process is likely to be upheld. Where race is considered in some form or other, the courts will have to strictly scrutinize the facts to determine if race is being considered appropriately.

The Davis Medical School admissions process was an open, honest and frank one. There was no coverup of racial policy. That may not always be the case. Selection decisions based on comparision of individual files where quantifiable criteria are evaluated, permit professional schools to bury the selection process under a mountain of verbiage and artificial criteria that conceal an unstated but existing racial preference program. Courts would find such a process very difficult to review. In many ways the Powell decision encourages a concealed rather than an open admissions process. That encouragement is definitely a detriment to all future applicants who wish to challenge the admission systems they believe to be racially biased.

The Supreme Court ruling in Bakke does not distinguish between programs where race is considered as one of many elements in the applicant's background and programs where it is the primary and decisive element. Only Justice Powell does so in offering his support of the "Harvard Plan." In reality, the distinction was not squarely before the court. By ruling on Title 6 of the 1964 Civil Rights Act, the Davis program could be struck down and Bakke admitted without ever considering the issue of race-consciousness. The finding of racial discrimination eliminated the need for further discussion.

The Young Americans for Freedom brief in support of Bakke urged the Court to rule that the consideration of race is impermissible unless justified by the most powerful and compelling governmental interest such as the threat of invasion or of civil war. The brief emphasized the rights of an individual to be considered for a seat, position or job on the basis of his or her experience, skill, and talents and not on the basis of skin color, surname, religion or heritage. No one's civil rights can be curtailed by a program that judges men for what they do and not for what they are.

Justice Powell's approval of some considerations of race leads to tremendous difficulties in selecting individuals on a fair and unbiased basis. As a hypothethical example, a medical school may have two seats left in its first-year class and have narrowed the choices to fill the seats to three applicants: A, B and C.

A has a B+ average and scored in the 80th percentile in his medical school admission test. He enjoys science courses, relates well to people and is president of his under graduate class at college. He is a Chicano American, but his parents are wealthy ranchers from Texas.

B is a Jewish applicant whose parents are low-paid blue-collar workers. He had to work his way through college full time. B has a special interest in helping the elderly and besides maintaining a straight A average and having the admissions test score in the 98th percentile, volunteered 18 hours a week of his time to help out at a senior citizens clinic.

C is a black ghetto youth who made it through his local university with a B average and admission test score in the 71st percentile. His father is unemployed but his mother is a postal clerk who earns $13,000 a year. He has three brothers and sisters and received a full scholarship to his local university.

Under a fully race-conscious program only A and C would be considered for the two seats. B would not have even been considered although he is a member of a of a religious group that was severely discriminated against in the past.

Under neutral criteria B would be seriously considered and likely admitted because of his high grades and test scores. B has clearly demonstrated a motivation to help others and a commitment to the community.

If some consideration is given to race, in hopes of obtaining a diverse student body, then it is likely that A and C will still be the only candidates for the two seats available and B will be considered but not seriously, in spite of his high qualifications and economically disadvantaged background. Such a process may be in violation of Title 6, but how could a court review the selection process if the committee only stated that it gave some consideration to race.

Bakke is the first step, as quotas have not been enshrined in law. However, the decision does not go far enough to set forth guideposts for future action. Its significance for the future lies in the hands of other judges and lawyers. We can rest assured that a great deal of further litigation is in the offing since little change is occurring in affirmative action programs in both schools and government.

The opinion of the Court indicates that race is not sufficient alone for admission to graduate and professional schools or employment where other qualifications are present. I believe that where the exceptionally qualified applicant is denied admission or a job because of race, he has cause to sue, and under the Bakke decision should prevail.

Justice Powell's swing decision does not require schools, colleges and universities to ignore race but permits them to consider race as a factor of potential contribution of an applicant to his school. No policy of racial preference stated or unstated can be upheld. I believe the Bakke decision will not support those who wish to offer positions in medical school and employment on the basis of race.

The short-run effect of Bakke will probably be a reformulation of the more open admission process and an effort to conceal an otherwise clear racial preference. Litigation will be more difficult but there will be reforms to make the selection process more open and fair by employing useful racially neutral criterial for selection. After all, it is individuals not races that practice law and medicine, and become our future leaders.

Marco De Funis filed the first reverse discrimination lawsuit in 1970 when he was denied admission to the University of Washington Law School, which had admitted minority appliants with lower academic qualifications than his. Because he was admitted under a temporary court order and was on the verge of graduation when the case finally reached the Supreme Court, the Court chose to declare his case moot and avoid ruling on the difficult questions raised. Now a practicing attorney in Seattle, he wrote the brief submitted by Young Americans for Freedom in the Bakke case.

The Constitutional Issues in the Bakke Case

by Kenneth F. Boehm, Esquire

"No state shall. . . deny to any person within its jurisdiction the equal protection of tne laws"

14th Amendment

The facts in the Regents of the University of California v. Bakke were never disputed. Allan Bakke, a white student, had applied to the Davis Medical School of the University of California in both 1973 and 1974. In both years his college grade point average and his MCAT standardized test scores were superior to those of the students admitted to Davis through the regular admissions process. More importantly, Bakke's grades and scores were markedly superior to those students allowed to compete for a block of 16 seats set aside for minorities. It became clear to Bakke that but for his race, he would have been admitted to Davis Medical School. This presumption has never been refuted by the school, which, it should be noted, was heavily supported by both state and federal government subsidies.

The constitutional question involved can be simply stated: was Allan Bakke denied the equal protection of the laws?

To answer that question and to understand the constitutional issues raised in the Bakke case, it's necessary to study the Equal Protection Clause of the Fourteenth Amendement. On its face, the Equal Protection Clause is a restriction on a state's power as well as a guarantee of equal protection.

First, it must be understood that "equal protection" is not and cannot be an absolute term. Most laws and regulations do not affect everyone equally. For example, state income taxes apply only to persons with certain income levels, states limit the right to vote or drink alcoholic beverages to persons who have passed a certain age, only men may be drafted, etc. While the Equal Protection Clause does not require that laws affect everyone equally at all times, it does require that any classifications made by the state be reasonable.

In order to determine which statutory classifications satisfy the constitutional requirement of reasonableness, the Supreme Court of the United States has promulgated two tests.

The first test is sometimes called the traditional equal protection test. It is used only when no fundamental right (a right guaranteed by the Constitution such as voting, freedom of association, etc.) is involved and when the statutory classification is not a "suspect" classification such as race, religion or sex. The traditional equal protection test, simply requires that the classification be rational, that it further some proper governmental purpose, and that all persons within the class be treated equally.

The second test is sometimes called the "strict scrutiny" test. This test is required when the classification affects a fundamental constitutional right or is based on a suspect classification. If this is the case, the statute must not only meet the traditional standard of reasonableness but it must also be proven necessary to promote a compelling state interest and it must be proven that there are not alternative means to advance that interest which would impose a lesser burden on the disadvantaged group. Loving v. Virginia, 388 U.S. 1, 11 (1967); Associated General Contractors of California v. Secretary of Commerce 438 F. Supp. (C.D. Cal, November 2, 1977); Dunn v. Blumstein, 405 U.S. 330, 337 (1972).

Classifications based upon race, where the classification results in denying a person legal rights or benefits because of his race, are always subject to strict judicial scrutiny. This interpretation was summarized by the United States Supreme Court in McLaughlin v. Florida, 279 U.S. 184 (1964):

> But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteeneth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect;" Bollins v. Sharpe, 347 U.S. 497, 499, 98 L Ed 884, 886, 74 S. Ct 693 and subject to the "most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216, 89 L Ed 194, 198, 65 S Ct 193; and, "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, Hirabayashi v. United States, 320 U.S. 81, 100, 87 L Ed 1774, 1786, 63 S Ct 1375.

The strict scrutiny test not only places the burden of proving a statute's constitutionality on the state (Bakke v. Regents of University of California, 553 P. 2d 1162), but it requires such a heavy burden of proof when the classification is racial that no U.S. Supreme Court decision since World War II has upheld a racial classification which resulted in detriment solely on the basis of race: Korematsu v. United States, supra, and Hirabayashi v. United States, supra. The compelling state interest, in those two cases was national security. An interesting historical footnote involving the Korematsu case, which tested the constitutionality of the U.S. government's policy which locked more than 100,000 Japanese-Americans in internment camps, is the role played by prominent American liberals. The program of rounding up American citizens, solely on account of their race, and putting them in specially constructed camps - without a trial - was actively backed by Franklin Roosevelt and California Attorney General (and later Chief Justice)

Earl Warren. It was opposed, as unconstitutional, by J. Edgar Hoover. Both the Korematsu and Hirabayashi cases came under severe legal criticism after the war (E. G. Rostow," The Japanese-American Cages -- A Disaster," 54 Yale Law Journal 489 (1945).

In examining the constitutional issues raised in the Bakke case, it's important to note that the U.S. Supreme Court did not base its decision to invalidate the Davis Medical School special admissions program on constitutional grounds. Instead the program was judged to have violated Title VI of the 1964 Civil Rights Act. This is in keeping with the Supreme Court's long-established policy of not deciding a case on constitutional grounds if it can be decided on statutory grounds. Justice Brandeis summed this practice up in his concurring opinion in Ashwander v. T.V.A., 297 U.S. 288 (1936):

> The Court will not pass on a constitutional question although properly presented by the record, if there is also some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. 297 U.S. 347.

This is not to say that the constitutionality of reverse discrimination was not examined by the members of the Supreme Court. Mr. Justice Powell went so far as to argue that while achieving a diverse student body was a compelling government interest, a quota system wasn't necessary (or "the least burdensome alternative" required by the strict scrutiny test). Therefore, the special admissions program was invalid under the Equal Protection Clause. For their part, the four Justices who believed that the special admissions program was constitutional (Brennan, White, Marshall and Blackmun) also joined in the debate on constitutional issues. The main thrust of their analysis was to concede that the racial classification involved did require strict judicial scrutiny but to argue that overcoming minority underrepresentation in the medical profession was a sufficiently compelling government interest to justify the use of race.

While there was a great deal of factionalization among the members of the Supreme Court in the Bakke decision, there was general agreement as to the general test to be used to reach the proper decision. The opinion of Justices Brennan, White, Marshall and Blackmun summarized the test in one sentence:

> Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.

But, to agree on the test is not to agree on its results. The constitutional questions raised in the Bakke case include whether strict scrutiny is required by the type of racial classification found in this case, whether the government interest served by the classification is sufficiently compelling and whether there are less restrictive alternatives available.

Turning to the question of whether the type of racial classification promoted by Davis Medical School's special admissions program required strict judicial scrutiny, the petitioner (Regents of the University of California) argued that it did not. While conceding that a state university's decisions based on race are reviewable under the Fourteenth Amendment, the petitioner's claim is that strict scrutiny should only be applied to classifications that disadvantage "discrete and insular minorities."

Powell strongly disagrees with this interpretation, endorsing instead respondent's (Bakke's) view that the level of scrutiny doesn't hinge on membership in a minority group. Powell sums up the logic of Allan Bakke's position this way.

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

The argument that the Fourteenth Amendment is applicable only to blacks is totally without any legal merit, in spite of its frequent appearance in the public debate on reverse discrimination. The Supreme Court dealt with this point bluntly in Buchanan v. Warley, 245 U.S. 60 (1917):

> While a principal purpose of the [Fourteenth] Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. 245 U.S. 76

Specifically the Fourteenth Amendement has been used to protect the rights of Asians, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886); non-residents, e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); corporations, e.g., Smith v. Cahoon, 283 U.S. 553 (1931); and, in the majority of such cases decided by the Supreme Court, whites.

The opinion of Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall and Mr. Justice Blackmun on the question of whether the racial classification in the Davis Medical School special admissions program required strict scrutiny is that it did. They reasoned that it would be a risky precedent to apply any lesser standard of scrutiny to a racial classification. Their point was that, even with the higher level of scrutiny, there was a sufficiently compelling state interest coupled with a lack of less burdensome alternatives - just the combination necessary to justify the racial classification.

The question of whether the government interest served by the racial classification was compelling enough to justify that classification was examined by Justice Powell in relation to four possible government interests. Three of the four interests were rejected.

Justice Powell argued that reducing the "historic deficit" of minorities in the medical field, if that mandated preferring a certain percentage of a minority group in medical school for no other reason than race, is discrimination for its own sake.

On the question of using the special admissions program to counter the general effects of societal discrimination, Justice Powell summarized his view as follows:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.

Justice Powell then gave short shrift to the claimed compelling interest of providing minority doctors for underserved communities by pointing out that there was "virtually no evidence in the record indicating that petitioners' special admissions program was either needed or geared to promote that goal."

Only in the case of allowing a university to create an ethnically diverse student boy did Justice Powell find a sufficiently compelling government interest. He qualified his view by arguing that the Davis Medical School form of racial classification was not necessary to promote the interest of having a diverse student body.

The final constitutional question of whether there were less restrictive alternatives to promoting the compelling state interest was answered in the negative by Justices Brennan, White, Marshall, and Blackmun. The four Justices used sociological data to argue that using constitutionally safe classifications, such as poverty or family educational background, would not appreciably boost black enrollment. In short, they argued that there were no reliable alternatives to race-conscious admissions programs.

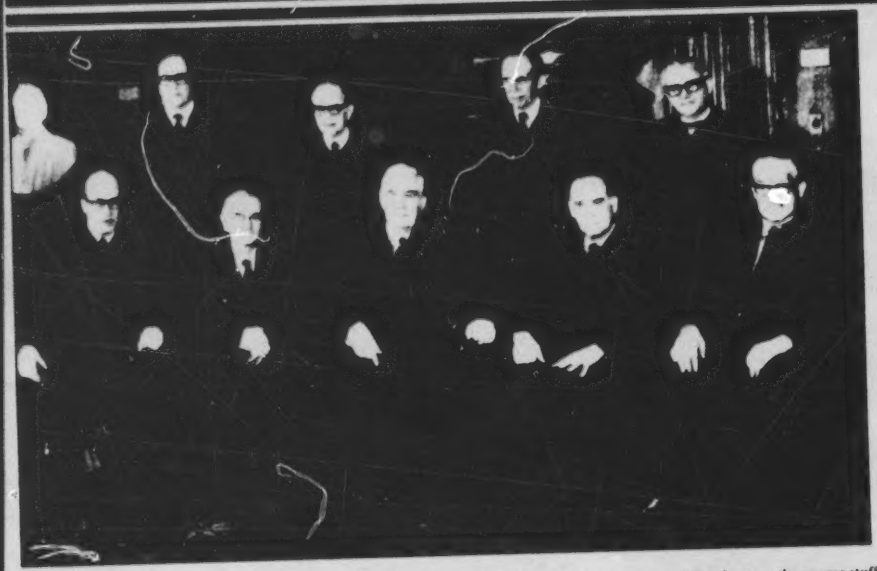
Justice Powell countered this view by endorsing the program used by Harvard University to create a diverse student body. He distinguished the Harvard program from the quota system practiced by Davis in two important ways. First, there was Harvard's acceptance of a much broader type of diversity (geographic, cultural and economic as well as racial). Second, it didn't "close the door" to anyone being considered. The Davis program, in contrast, would not even consider the application of any white for the sixteen openings it had set aside for its special admissions program.

Thus, in terms of majority support in the U.S. Supreme Court, three constitutional law positions were given support in the Bakke case. First, there has been no lessening of the standard of review required in cases involving racial classifications. Strict scrutiny remains the required standard. Second, there is qualified support for the position that a state university's programs promoting diversity may be viewed as a compelling state interest. Third, there is ambiguous support for the proposition that a race-conscious program to support a policy of promoting diversity may be the least burdensome alternative.

Because of the limited scope of the Bakke decision and the lack of a real consensus on key constitutional issues, the most widely held view among constitutional scholars is that there will have to be more major decisions before the issues are clearly resolved. Then, perhaps, there will be true equal protection of the laws for people of all races.

Kenneth F. Boehm, 29, is an attorney, former Assistant District Attorney, and a co-founder of the District of Columbia Law School. Currently the Political Director of the Fund for a Conservative Majority, he served as Projects Director of Young Americans for Freedom at the time of the Bakke case.

The Legal Issues of Reverse Discrimination



by John F. Zink

With the fall term of the United States Supreme Court the issue of "reverse discrimination" has again gained national attention in the case of *Regents of the University of California* v. *Bakke*. While the *Bakke* case, discussed below, deals only with the issue of preferential admissions programs at state-sponsored colleges and universities, and the attendant discrimination against white students, the issue of "reverse discrimination" reaches to almost every level of American society and law from public education to employment practices and labor relations. It is an issue about which every citizen, not merely those in the legal profession, should be fully aware. As Justice Brennan stated in the case of *DeFunis* v. *Odegaard*, "(F)ew constitutional questions in recent history have stirred as much debate . . ."[1] It was in the *DeFunis* case in 1974 that the issue of reverse discrimination first gained national attention when the Supreme Court refused, on the grounds of mootness, to decide whether a preferential admissions program for blacks and other minority applicants at the University of Washington had violated the Fourteenth Amendment equal protection rights of a white applicant who was denied admissions. In that case no fewer than 26 amicus curiae briefs were filed on behalf of both sides of the issue.[2] Even more have been filed in the Bakke case, including one on behalf of Young Americans for Freedom written by Marco DeFunis himself, now a practicing attorney in Seattle.

Since the movement to end de jure racial discrimination against blacks and other minority group members was launched by the Supreme Court in *Brown* v. *Board of Education of Topeka*[3] in its rejection of the "separate but equal" standard of the 19th century[4], the issue of racial discrimination has come full circle so that in 1977 the high court is called upon in an attempt to end the *Animal Farm* approach of granting preferential treatment on the basis of race under the banner of "all men are equal—but some men are more equal than others." The problem is basically one of attempting to rectify generations of discrimination against minorities by the practice of state-imposed discrimination against the majority. This practice, while well-intended at the present, has grave potential for the future. As a column by Meg Greenfield in *Newsweek* pointed out, "By our brazen clinical insistence on a Nuremberg-like analysis of each child's racial and ethnic background—is he half this or only a quarter that?—we are giving the young to believe that these distinctions are the proper stuff of official decisions."[5]

The legal argument centers around the Equal Protection Clause and its application to the states through the Fourteenth Amendment. In *Loving v. Virginia*, the Supreme Court stated that, "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[6] Justice William O. Douglas, in his dissenting opinion in the *DeFunis* case, flatly stated, "There is no constitutional right for any race to be preferred."[7] The basic problem in the special admissions programs, which are at the center of both *DeFunis* and *Bakke*, is that non-minority students who possess higher qualifications than those in the preferred category occasionally lose in the competition for admission because of the special treatment accorded to minorities. This situation is true in any use of the "affirmative action" programs.[8] In its efforts to afford political and economic equality and to redress past injustice, the government has somewhere run afoul of the constitutional command that all citizens be considered equals before the law.[9]

It should be noted at this point that not all classifications by race to benefit minority groups have been held unconstitutional. To ignore this fact would be to

John F. Zink is a YAF member attending the University of Kentucky College of Law.

ignore the basic complaint against affirmative action and special admissions programs. In many instances the Supreme Court has upheld such classifications: in *Swann v. Board of Education* the use of racial classification was upheld to achieve integration in public schools; in *Lau v. Nichols*, to require a school system to provide instruction in English to children of Chinese ancestry; and in *Katzenbach v. Morgan*, to uphold the right of non-English speaking persons to vote.[14] However, these instances, where the use of racial classifications has been approved, can be distinguished from cases of benign discrimination in that in none of them did the extension of a right or benefit to a minority have the effect of depriving persons who were not members of a minority group benefits which they would otherwise have enjoyed. For example, in the case of court ordered busing to achieve integration, white children were not deprived of their right to attend school.[15] Preferential treatment for minorities has been approved in such areas as hiring practices only where the plaintiff has proven actual past discrimination, absent such proof, the courts have been unwilling to grant approval.[16]

Supporters of affirmative action and special admissions programs contend that because of a culmination of generations of racial and economic discrimination and cultural deprivation, minority students are not able to compete on equal terms with their Caucasian counterparts. They argue that the racial classifications used in affirmative action programs are not constitutionally suspect because they are not "invidious" nor "stigmatizing" toward racial minorities.[17] In addition, supporters seem to be urging a type of social engineering in asserting that by giving preference to minority applicants in professional schools and in employment practices the entire group - and society - will benefit as more minority doctors, lawyers, and businessmen minister to the needs of their communities and serve as models that the system really works.

Opponents contend that the use of racial quotas and preferences is illegal, unjust to those excluded, stigmatizing to those they are designed to assist, and destructive of standards at a time when there is a need for better, not less qualified professional and business people.[18] Larry M. Lavinsky, chairman of the National Civil Rights Committee of the B'nai B'rith Anti-Defamation League recently wrote, "A racial quota in special admissions, however well intentioned, is destructive of equal opportunity. Given the limited number of places to be filled, quotas diminish the opportunity to compete of those who do not belong to the preferred group."[19]

Justice Douglas pointed out that such programs were "fraught with dangers" by what standards is the determination to be made which group gets special treatment, how much special treatment is to be afforded the lucky group and for how long, and how is one to be placed in such a group? Douglas warned that a segregated admissions process creates suggestions of stigma and castes no less than a segregated classroom, and in the end may produce that result despite its contrary intentions. In *DeFunis* the justice wrote, "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordionlike quality."[16] Echoing this warning, the California Supreme Court in the *Bakke* case stated that the principle that the Constitution sanctions racial discrimination against any race, minority or majority, is a dangerous concept with great potential for misuse. To uphold the special admissions program at the University of California, the court stated, would be to sacrifice principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone - a struggle, the court noted, which has only in recent history succeeded in removing the legal barriers to equality.[17]

In making a determination as to the constitutionality of special admission and affirmative action programs, the court must apply one of two tests. The first, and more lenient, test is termed the "rational basis" test, used in a variety of situations to determine the constitutionality of government action, this test holds that a classification made by government regulation will be valid if any state of facts may reasonably be conceived in its justification. Generally, a court employing the "rational basis" test will strain to find any legitimate purpose in order to uphold the propriety of the state's conduct. The second, and more stringent, test has been termed the "strict scrutiny" test; this test has generally been applied in the past in cases involving racial classifications by the state resulting in a detriment to a person because of his race. The "strict scrutiny" test has two parts: first, it must be shown that the purpose of the classification serves a compelling state interest; second, it must be demonstrated by strict scrutiny that there are no reasonable ways to achieve the government's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. The "strict scrutiny" test places the burden of proof on the government to show that its classification is constitutional.[18]

The California Supreme Court rejected the argument that the "strict scutiny" test was not applicable in the *Bakke* case where minority students were preferred, on the basis of race, over white students. The court stated, "We can not agree with the proposition that deprivation bas[ed] upon race is subject to a less demanding standard of review under the Fourteenth Amendment if the race discriminated against is the majority rather than the minority."[19] Justice Douglas called for the application of the "strict scrutiny" test against the racial classification used by the University of Washington in its special admissions program in the *DeFunis* case.[20]

In many cases reaching lower federal courts, affirmative action programs have failed to meet the constitutional standard of equal protection and have been ruled unconstitutional, or in violation of specific statutes. In *Rai Ballie v. Kleppe* the federal government's policy of allowing only "socially or economically disadvantaged persons" to bid on service contracts involving Homestead Air Force Base was challenged by a white businessman who claimed that he was denied the right to bid on the contract in question solely on the basis of his race. The court, finding for the plaintiff, stated that his Fourteenth and Fifth Amendment rights had been violated by his total exclusion because of his race.[21] The promotional policy of a school district by which minority employees gained a preference was successfully challenged in *Anderson v. San Francisco School District* where the court stated that preferential treatment under the guise of affirmative action is the imposition of one form of racial discrimination in the place of another.[22]

Carter v. Gallagher involved the appeal of a federal district court's order requiring the Minneapolis Fire Department to com-

pensate for alleged past discrimination by employing an absolute hiring preference in favor of minorities. The appeals court stated that the Fourteenth Amendment clearly prohibited any government discrimination based on race, and found no justification for a preference in the compensatory theory advanced by the plaintiffs. *Carter* involved a situation where individuals, because of their race, were to be denied a right in order to achieve a state goal; the court further distinguished this from cases in which compensatory hiring has been ordered by the court where the minority plaintiffs were able to prove actual instances of discrimination in hiring.[23]

The courts have been equally unwilling to allow discrimination against the majority to stand in cases involving statutory rights. Chief Justice Warren Burger in *Griggs v. Duke Power Co.*, involving the 1964 Civil Rights Act, stated, "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[24] In *Marquez v. Omaha District Sales Office*, the court of appeals stated, "We also recognize that the Civil Rights Act of 1964 is not designed to serve members of a minority race to obtain special privilege or right because of race, creed, or color. Reverse discrimination is equally prohibited by the Act."[25] And in *McDonald v. Santa Fe Trail Transportation Co.* two white employees brought suit under the 1964 Civil Rights Act when they were discharged for misappropriating cargo while a black employee, charged with the same offense, was not discharged. The Supreme Court stated that federal law prohibiting racial discrimination applied with the same force with respect to discrimination against whites as that against blacks.[26]

In the case of *DeFunis v. Odegaard*, the United States Supreme Court dodged the critically important reverse discrimination issue by ruling the case moot. However, the case clearly presented an opportunity to provide the nation with needed guidance in this area. Justice Douglas, in his lengthy dissent, pointed out that the case was one in which the university (i.e., government) used race as the sole criteria by which it judged applicants and applied favoritism.[27] As mentioned above, the high court will again have an opportunity to address the problem of reverse discrimination when it rules on the *Bakke* case. And, unlike the *DeFunis* case, *Bakke* will not become moot as the white plaintiff, even though prevailing in the lower courts, was not admitted to the offending university. The facts in *Bakke* are, briefly, that the medical school of the University of California reserved 16 out of its 100 available positions, in the entering class, for minority applicants under a special admissions program. *Bakke*, a white applicant, who was excluded from the program and who had higher test scores and grades than some minority group members admitted under the program, claimed that the university unconstitutionally discriminated against better qualified applicants solely because they were not identified with a minority.[28]

In ruling in favor of the plaintiff, the California Supreme Court found that:

> *...although the special admissions program purports to be open to "educationally or economically disadvantaged" students ... only minority students had been admitted under the program since its inception, and members of the white race were barred from participation ... The University does not challenge the trial court's finding that applicants who are not members of a minority are barred from participation in the special admissions program.*[29]
>
> * * *
>
> *It is plain that the special admissions program denies admission to some white applicants solely because of their race.*[30]

The basic arguments have been made and the lines for this most important legal battle have been drawn. The central question under all the emotionalism which surrounds this issue is whether government-sanctioned racial discrimination against any race is to be allowed in our society. The fact that this issue goes to the basic heart of our constitutional system was expressed by Justice Douglas when he wrote, "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized ... So far as race is concerned, any state sponsored preference to one race over another ... is in my view 'invidious' and violative of the Equal Protection Clause."[31] But perhaps the issue was best addressed by Professor Philip B. Kurland in an amicus curiae brief for the B'nai B'rith Anti-Defamation League in the DeFunis case:

> *For at least a generation the lesson of the great decisions of this Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are now to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.*[32]

FOOTNOTES

1. *DeFunis v. Odegaard*, 416 U.S. 350, 40 L. Ed. 2d 164, 94 S. Ct. 1794, decided April 23, 1974.
2. *Id.*
3. 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954).
4. *Plessy v. Ferguson*, 162 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138.
5. Meg Greenfield, "Teaching Kids The New Discrimination," *Newsweek*, July 4, 1977.
6. *Loving v. Virginia*, 388 U.S. 1, 19 (1967).
7. *DeFunis v. Odegaard*, supra, 180 (L. Ed. 2d).
8. 11 Willamette Law Journal 134 (1974), "*DeFunis v. Odegaard*: Reverse Discrimination in Law School Admissions."
9. 12 Duquesne Law Review 580, 581.
10. *Swann v. Board of Education*, 402 U.S. 1 (1971); *Lau v. Nichols*, 414 U.S. 563 (1974); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).
11. *Bakke v. Regents of University of California*, 553 P. 2d 1152, 1160.
12. *Id.*
13. 75 Columbia Law Review 520, Lavinsky, "*DeFunis v. Odegaard*: The 'Non-Decision' With A Message."
14. *Id.* p. 520-521.
15. "Racial Quotas In Schools Are Destructive of Equality," Lavinsky, *The Louisville Times*, June 21, 1977, A 7.
16. *DeFunis v. Odegaard*, 181, 184.
17. *Bakke v. Regents*, 1171.
18. *Id.*, 1162.
19. *Id.*, 1163.
20. *DeFunis v. Odegaard*, see dissent of Justice Douglas.
21. *Ray Ballie Trash Hauling, Inc. v. Kleppe*, 334 F. Supp. 194 (S.D. Fla. 1971).
22. *Anderson v. San Francisco School District*, 357 F. Supp. 248 (N.D. Calif. 1972).
23. *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir., 1971).
24. *Griggs v. Duke Power Co.*, 401 U.S. 425 (1971).
25. *Marquez v. Omaha District Sales Office*, 440 F. 2d 1157 (8th Cir. 1971).
26. *McDonald v. Santa Fe Trail Transportation Co.*, 96 S. Ct. 2574 (1976).
27. *DeFunis v. Odegaard*, supra 174.
28. *Bakke v. Regents*, supra 1155.
29. *Id.*, 1159.
30. *Id.*, 1161.
31. *DeFunis v. Odegaard*, supra 183 to 184.
32. 75 Columbia Law Review 520, 522.

PART III:

ALTERNATIVES TO REVERSE DISCRIMINATION

Government Sanctioned Restraints That Reduce Economic Opportunities for Minorities

by Professor Walter F. Williams

There are many areas of economic and social life in which the law, "the rules of the game," produces adverse affects on minorities in such areas as housing, education, police services, and so forth. But the principle that I want to demonstrate is that certain racially "innocent" laws spell disaster for certain segments of the population. The attribute that is common to all of these laws is that they place restraints on voluntary exhange in a way disadvantageous to minorities.

One of the best strategies to raise the socioeconomic status of Negroes as a group is to promote a freer market. The reasoning here is that the welfare of minorities can be improved if fewer of the decisions influencing the daily lives of minorities are made politically. One must recognize that in the political arena the decision-making criteria approximate majority rule. Almost by definition competition in the political arena is one in which a minority group is going to be most handicapped. While I recognize that occasionally the majority will take measures that will benefit a minority, I suspect that most often the majority will act in ways that it perceives to be in its own interest, which may not coincide with minority interests.

The market system, on the other hand, is essentially one-man-one-vote. While people may have unequal amounts of dollars, each person's one dollar has the same power as another person's one dollar. In the marketplace there is relative parity. This parity is nowhere more clearly seen as it is in the housing market. Many areas of many cities were once affluent all-white neighborhoods. Now many of these areas are predominately occupied by blacks. Virtually no one ever stops to ask the question: how did blacks take over these housing resources? It was through the market. Blacks simply outbid whites for housing. That is, for example, blacks told landlords that they would pay $100.00 per unit for a house separated into four parts yielding the landlord $400.00 per month on a building that he was formerly renting as a single family dwelling for about $200.00 per month. While one may have moral reservations about the market methods of the allocation of housing for blacks and poor people, he should consider the alternative. Taking only the years 1967 to 1971, government housing programs destroyed 528,000 units of housing. They replaced 201,000 units. Of the number of units replaced, less than one-half were for low- and moderate-income families. What the housing policy did do was increase housing for high-income people and increase the amount of land available for office space.

Looking at any set of statistical data we see that, absolutely and relatively, the free housing market has provided more housing for the poor than all government housing programs put together. Furthermore, the competitive market has done more to break housing discrimination than any government edict; witness how difficult it has been to prevent neighborhoods in our cities from changing from all-white to all-black, even during times of virulent racial discrimination. Blacks and other poor minorities

cannot obtain housing in the suburbs as easily because of political restraints to subvert the operation of the market, such as zoning laws requiring minimum sized lots and houses and requirements that units be single-family units.

In terms of education, the advantages of allocation by the market are also seen. In predominantly black communities we observe some good clothing, some good housing, some good cars, some good food--but no good schools--why? The answer is seen if one compares how clothing, housing, cars and good are delivered by the market mechanism and schools, public schools, that is, are delivered by the political mechanism. Interestingly enough, the few higher quality schools in black communities are the Black Muslim schools, parochial schools, and private community schools which are provided through the market mechanism.

One need not rely on modern examples alone to illustrate how the free market has benefited blacks. After the Civil War, while there was much hostility towards freemen, historical evidence shows that black sharecroppers and tenant farmers received the same terms of exchange from planters that their white counterparts received. Attempts of white planters to form a conspiracy against freemen to prevent their wages from rising in reponse to market conditions met failure:

> That many planters desired cartels to exert monopoly power in the labor market is easily documented. Newspapers and popular periodicals carried numerous appeals for organization. A contributor to the Southern Cultivator in 1865 proposed that planters stand together in enforcing contracts; with landlords acting as one, the freeman "must consent or starve." Four years later a planter bemoaned in the pages of DeBow's Review that, "there was no concert of action on the part of planters to oppose these ever-increasing exactions (of the freemen)." "If they desire success let the farmers, as a body, cooperate together, and let each other's labor alone." Evidently something was preventing successful organization, for otherwise these repeated proposals make no sense.*

The repeated attempts of planters to prevent the freemen's wages from rising failed because of the absence of a state-granted enforcement technique. For various reasons the planters could not summon state powers to make effective their desire to collude against the freeman farmers. Many other examples can be given of how minorities are less disadvantaged when the allocation of resources occurs through the market than when allocation occurs by a political mechanism. The reason for this advantage is that personal characteristics play a smaller role in the market arena. The most tragic thing about the failure to recognize this is that the failure of a large percentage of Negroes and other minorities to "melt" into America's melting pot is viewed by many members of society as group incompetence. Hardly anyone lays the responsibility for this problem where it belongs:

on the excesses of government controls. I would guess that if we abolished the minimum wage law, reduced licensing restrictions, changed labor legislation and reorganized the delivery of education,** in twenty to thirty years hence there would be no "Negro problem" as there is no Japanese, Chinese, Jewish or other earlier-immigrant problem. These people were able to start off poor and progress because they did not face the market restrictions that today's minorities face.

---

* Robert Higgs, Competition and Coercion: Blacks in the American Economy, 1865-1914 (Cambridge University Press, 1977), pp. 47-48.

** See my article "Tuition Tax Credits: Other Benefits," Policy Review, Spring 1978.

Professor Walter Williams, whose remarks made at a Task Force-sponsored seminar on Capitol Hill appear elsewhere in this Report, is a Distinguished Scholar at the Heritage Foundation. This article, originally published in the Fall of 1977, received the Alpha Kappa Psi Foundation Annual Award for contributing "to the better understanding of economic principles by the public."

This article is adapted from Policy Review (Washington, D.C.: The Heritage Foundation, July, 1978), pp. 24-26.

NEW CHALLENGES FOR BLACK ECONOMIC PROGRESS

by

Edward C. Smith

Several weeks ago The Washington Post published an article on the subject of "A New Black Vanguard: Corporate Conservatism is Voiced." The unmistakable tone (though carefully camouflaged) of the article is that the so-called "neo-conservatives" are in fact little more than the new Uncle Toms, the "house niggers" of Mahogany Row. This is an unfortunate implication because it will undoubtedly have the effect of discouraging many young, impressionable blacks from pursuing the rigors and rewards of private sector advancement, while at the same time working in the favor of those social-reform minded whites and blacks who patronizingly view the cause of (especially disadvantaged) blacks as their exlusive preserve. Consequently, such young blacks will continue to be drawn into the ranks of those blacks who survive as wards of the state; the frustrated beneficiaries of the "charity" of begrudging taxpayers.

There is a tendency on the part of many blacks (buttressed with support from many liberal whites), especially those first generation middle-class blacks who have achieved social advancement (largely through their involvement in federally subsidized "social welfare-affirmative action programs") to view the White House as an all-powerful plantation house where the President resides as supreme master over an ever-expanding federal estate.

This view, regardless of how naive, can be easily understood when one recognizes the simple fact that most black American progress has come about largely through national rather than local economic and political initiatives. Consequently, the majority of blacks tend to see the federal government as their sole patron and protector and will most likely continue to support big government programs, especially in the areas of social services and employment, regardless of how overly ambitious, inefficient, and expensive they prove to be to the nation's taxpayers. The luxury of enjoying this point of view is further explainable when one considers that a substantial percentage of the black population (for a host of familiar historial reasons) consumes more than it contributes to the resources of the national treasury.

I have long felt that there is a considerable portion of the black population that would much prefer to seek security and advancement within the confines of the "federal plantation" rather than strike out into the less protective and less patronizing environment of the private sector. Consequently, many of these "plantation" blacks view such concepts as "balanced federal budgets" and "controlling inflation through tax reductions" as an affront and an abandonment to black progress; in short, they find it difficult to mesh their special interest agenda into the larger national interests agenda and to properly tailor their demands to fit the contours of the national fiscal condition.

The evidence that blacks can enter and handsomely advance to the private sector is best demonstrated in the area of professional athletics, namely the big three, football, basketball, and baseball.

Since the end of World War II, professional sports has become one of the largest growth industries in America. Today cities exhibit their new sports plazas and coliseums with the pride that was formerly reserved for the erection of great churches and civil monuments. Furthermore, the expansion of professional football, basketball, and baseball franchises has helped to incorporate economically emerging cities like Seattle, San Diego, Tampa Bay, and San Antonio into the larger common cultural and commercial network.

Also, it is essential to keep in mind that during the 1940s and early 1950s the majority population of the big three was overwhelmingly white. And the penetration of blacks did not come about as a result of federal intervention, white guilt, or the need for compensatory treatment; it came about simply on the basis of the acknowledgement and availability of black talent and that the spectator market for watching excellence in motion is enormously profitable and virtually colorblind.

The black presence in the big three is felt in every category; players, scouts, coaches, managers, publicist-concessionaires, media commentators, etc. More importantly, however, each player entered and advanced his career strictly on professional merit. There is not a single black in professional sports who received and maintained his position as a result of an affirmative action program. After all, professional athletics in America is played out in the much larger national arena of the free enterprise system, where the rules of the game (when unbiasedly applied) are fair and firm, and where the admission ticket is the desire to compete and to excel, and where the laurels and rewards go only to those committed to becoming (with a little luck) the very best at what they do. Furthermore, anyone who has participated in competitive athletics knows how much more mental than physical effort is required in order to survive and succeed in any given sport. I say this in order to dispell the frequently used argument that acknowledges the dominance of blacks in certain sports by concluding that they are simply "innately superior" to non-blacks in physical abilities. Perhaps that description could be justly applied to the limited likes of Julius Irving and Jim Brown but not much further than them. The great majority of black athletes are like the great majority of non-black athletes, simply ordinary individuals who work very hard to tune their minds and muscles to pursue extraordinary achievements. I am reminded here of Ralph Waldo Emerson's remark after learning of the outcome of the famous Civil War Battle of Antietam: "A hero is no braver than an ordinary man, but he is brave five minutes longer." Just as blacks have succeeded in professional sports in such stellar fashion, I am confident that they will continue to penetrate and produce in other equally competitive areas in the private sector as well.

Before concluding, something must also be said about the average black's perception of the "private sector." In most instances the word "private" connotes exclusiveness and "whites only" signs. Consequently, many less fortunate blacks frequently view those of their own race who enter and advance in the private corporate community as having been blessed with

the good fortune of having the "right" (near white) complexion, features, demeanor, and temperment or else they too would be out on the streets like so many other blacks. In other words there is very little belief that an individual (especially one blessed with prominent negroid features) received his position because he was the best person available. Of course there are many instances where this is true, where an individual is placed in a position simply as a token, but there are equally as many instances where it is clearly untrue. For example, all of the fifteen black professionals with whom I worked on the White House staff were equally, if not more qualified, for their positions than their white counterparts in terms of ability, credentials, and experience.

Finally, blacks must be encouraged to view their particular economic conditions and aspirations as they relate to national and global conditions. For example, several months ago I attended the Congressional Black Forum, which had arranged a conference to evaluate the President's State of the Union Address. Most of the participants severely attacked the proposed increases in the defense budget because they viewed them as representing a needless drain on federal expenditures for "human needs" (as if adequate defense was not a fundamental human need).

I attempted to explain that since the conclusion of World War II, the primary stimulus for major technological advancements (and the creation of whole new industries) in consumer products and services has been the result of direct "spinoffs" from the infusion of federal money into the defense weapons industry.

Furthermore, defense technology - aside from becoming virtually obsolete (for most defense purposes) at the moment of invention - nonetheless requires a high degree of precision instrumentation and sophistication. The very same technology that pioneers a new weapons system is frequently transferred into the development of consumer goods, from pocket calculators, digital wrist watches and instant developing film to such marvels as three dimentional X-ray machines, laser controlled cancer surgury techniques and so on. All such inventions have to be marketed, consumed, repaired, researched, improved, remarketed and so on. Therefore, for blacks to naively disassociate themselves from the interest and activities of the so-called "military-industrial complex" simply because such a complex is intimately associated with the preparation for war, would, in my opinion, prove to be very harmful for long-range black economic advancement.

Also, one must keep in mind that the economies of scale of most sectors of the defense industry are heavily weighted in the direction of nuclear deterrence, which, simply speaking, means the research, development, and deployment of weapons which are designed to discourage any situation from arising that would require their use. Consequently, the weapons development industry has ironically become one of the principle spawning grounds for some of the most humane and beneficial technology available to contemporary man. For eight years I served as an Education and Management Consultant to the Director of the John Hopkins University Applied Physics Laborary. During my tenure I had the opportunity to closely monitor the staggering developments that were being made in the field of bio-medical engineering, especially in the area of electronically controlled, brain

wave connected prosthetics. What impressed me more than the inventions themselves, however, was the fact that the miniaturized electronic circuitry so necessary to the development of such inventions, all evolved directly from the circuitry technology employed in the development of reconnaissance satellites.

There appears to be no evidence that blacks will shrink from the new and demanding challenges that presently confront them. Neither will they allow themselves to be dwarfed by the sheer magnitude and diversity of our nation's market economy. Of course there will be moments when the rising class of black corporate executives will be criticized for being "elitist", "carbon copy (no pun intended) capitalists," and worse. But that is to be expected. Such misunderstanding of motivation is the albatross of all pioneers.

Edward C. Smith, formerly of the White House Staff and the Heights School, is a Senior Research Associate for the Lincoln Institute for Research and Education, Washington, D.C.

PART IV:

CONGRESSIONAL REFORM OF AFFIRMATIVE ACTION

TASK FORCE SPONSORS LEGISLATION

Now that the initial reaction to the Bakke decision is behind us, we should ask ourselves, where do we go from here? Some are pleased, others are upset by the Supreme Court ruling. Few, however, believe that the matter of racial quotas has been resolved.

Because the controversy continues, Young Americans for Freedom has established this Task Force. Since members of Congress and other prominent individuals have assisted in preparing this Report and since some of the legislation herein endorsed has already been introduced in the Congress, these proposals should not be considered as mere idle suggestions. Instead, they represent a pragmatic program for legislative action.

In addition to supporting legislative attempts to remedy the inequities created by affirmative action, as it is currently practiced, YAF will continue to monitor court cases which deal with this issue. The organization is currently weighing its role in at least two cases which may reach the high Court within the next two years. However, it is doubtful that the Supreme Court will ever decide once for all every question dealing with affirmative action. It is up to the legislative branch to meet its responsibility in making public policy.

As the Task Force sees it, the Bakke decision was a first step away from the practice of reverse discrimination. However, it was only a first step. It is now up to the Congress to pick up where the Court has left off. If the Congress listens to public opinion, this is exactly what it will do. According to a Gallup poll, 83 percent of the American people want an end to preferential treatment in hiring and admissions based upon race. More than half of all minority group citizens feel the same way.

The Task Force presents the following suggestions with the optimistic expectation that the Congress will soon consider the very important and perplexing questions raised by the Bakke case and affirmative action in general.

The proposals which we endorse are designed to address some of the fundamental questions which the Bakke case left dangling. Before discussing the specifics a few general statements are in order. Three very significant, but generally unnoticed in the media, statements were made by Justice Powell in his opinion. While it is true that a single Justice's opinion does not make a majority, Powell's opinion is crucial, insofar as he made the majority on both the decision to admit Bakke and to allow racial considerations under appropriate conditions in college admissions.

The first important point to remember is that for the first time, the Court has ruled that "goals and timetables" are only "semantically" different from quotas. If they are to be treated in the same way, then the federal bureaucracy, which forces federal grantees and contractors to establish "goals and timetables" for hiring according to race will have to seriously reconsider its policy. While proponents of quotas try to downplay the significance of the Bakke case, and thereby reduce any chance for a "chilling effect" on the part of affirmative action administrators, the Powell opinion will have a very definite impact.

Second, while Powell would allow universities to take into account race as only one among other factors in the mix of admissions criteria, this will occur under the umbrella of academic freedom and applies clearly only to student admissions. One can argue that this strenghens equal opportunity for development and growth. The impact of this philosophy on employment cases has yet to be determined. This aspect of the problem, heavily involving merit (rather than opportunity), will be tested in a case which is on appeal in Detroit at the present time and possibly with another case which is currently moving towards the Supreme Court.

Third, Powell justified racial considerations as a remedy for past discrimination only if that past discrimination is illegal and provable. The federal bureaucracy currently forces quota programs upon academia and employers based upon "underutilization," whereby one is not charged with illegal discrimination, but just of not having a prescribed number of individuals of particular racial and ethnic backgrounds employed.

The legislation we endorse will make clear the law in regard to the above three points. While we view positively the Powell opinion in most of these matters, we believe that it is still necessary for the legislative branch to preclude any possibility that lower courts would interpret the opinion except in a manner which would outlaw quotas altogether. Further, where the high Court would allow racial preference, we would abolish such criteria entirely.

A brief description of each bill which we endorse follows.

MODEL LEGISLATION

The Model Legislation which the Task Force has developed is the product of our investigation into the problems involved with affirmative action and represents our attempt to include all of the major elements which we perceive to be necessary ingredients in comprehensive affirmative action reform. In devising this proposal, we owe a special debt to former Senator James L. Buckley and Advisory Board Chairman James M. Collins, who introduced bills which were studied carefully in putting together this proposal.

The Model Legislation complements other bills which we herein endorse; it attempts to accomplish in a single piece of legislation what other members of Congress are doing with individual bills.

The Model Legislation, the full text of which is reprinted in the appendix, has four major components:

First, the bill would for the first time give specific definition to the term affirmative action. The concept of widening available opportunities by recruiting disadvantaged applicants of all colors would be sanctioned. However, "goals and timetables" for hiring based upon color and sex and outright quotas would be made illegal.

Second, statistical data would no longer be considered as *prima facie* evidence of discrimination. An intent to discriminate would have to be established before findings of illegality could occur. Currently, mere data regarding the number of black and other minority employees is sufficient evidence for both the federal bureaucracy and courts to shift the burden of proof to the defendant. At the Task Force seminar Professor Walter Williams raised the issue of the insignificance of mere numbers in showing discrimination. Senator Buckley expressed similar concern about this current practice of "indictment by computer" (see appendix). Here we address that very problem.

Further, we would permit collection of data about an individual's racial and ethnic background only if a legal suit were already pending. A theme of this Report has been that the law should be color-blind and so should our whole society. As things stand now, however, the government forces employers and schools to collect information about the race and ethnicity of employees and students. The Task Force feels that this is an egregious violation of the right of privacy.

Third, the bill includes a section on legal fees. If the government or a private individual brings suit against an innocent school or employer, then the plaintiff should assume the legal costs incurred by the unjustly accused.

Fourth, the bill would increase penalties for illegal discrimination. Under this proposal, any damages suffered on account of discrimination would be tripled. The Task Force is firmly committed to the principle of equal treatment for all citizens. If we are to have a color-blind society, we recognize, then the government must see to it that public funds are never used for purposes of invidious discrimination. This legislation would very dramatically increase the risks one would run if he violated the civil rights laws.

The Task Force believes that federal anti-discrimination laws can be enforced. The goal of creating a society which really extends equal opportunity to all Americans is such a high one that we would very seriously deal with violators of anti-discrimination laws.

We oppose current federal penalties because criteria used in making decisions to cut-off funds to entire institutions are unclear and often unwarranted For example, entire school systems or universities are deprived of federal funds because some minor administrative unit is found in violation of federal administrative regulations in the affirmative action area. Cut-off is used as a coercive device to force schools into costly and cumbersome self-evaluations even when there is no reason to suspect prior discrimination. Also under the proposal, mere numerical disparities are not enough to show illegal discrimination.

An intent to discriminate would have to be demonstrated. Thus, there would be a greater assurance than there currently is that findings of discrimination would be accurate and not merely circumstantial. In such cases of clear racial bigotry, the Task Force wants the federal government to deal very harshly with violators.

In point of fact, the legislation represents the best way to assure that there will be vigorous enforcement of civil rights laws which are already on the books.

In the view of the Task Force, this legislation addresses itself to the real problems of affirmative action and would adjust our legal system so as to decrease the injustices which are currently committed in the name of affirmative action.

COLLIN'S BILLS (3) AN AGENDA FOR CONGRESS

by Representative James M. Collins (R-TX)

What would you do if, upon applying for a job with your local newspaper, you were rejected by the editor because the paper was "just hiring blacks and Latinos now." The Chicago woman who recently experienced this type of rejection was not alone in her anger and frustration.

One of the most often-expressed frustrations among millions of Americans is their view that "it doesn't make any difference who gets elected, because things aren't going to change anyway." The fact that fewer of those eligible then ever before voted in the last presidential election, despite three nationally-televised debates, bears strong witness to the pervasive strength of this sentiment.

Surely our democratic and competitive system is in deep trouble when only a bare majority of our qualified voters believe it a worthwhile enterprise on election day. The very credibility, and thus the future health, of our political system is suffering deep and grievous wounds when millions choose not to vote out of despair that the act is insignificant. Clearly, the system's credibility must soon be restored, or we will confront a political and constitutional crisis in America of unprecedented magnitude.

The issue of numerical quotas based on racial and sexual identity is one of the key issues on which the restoration should be based. Few issues so well illustrate the opposing directions being charted by public officials and private citizens in our nation.

On one hand, at a cost estimated to exceed $500 million annually, unelected bureaucrats -- quotacrats, if you will -- in the Department of Labor, the Department of Health, Education, and Welfare, the Justice Department, the Civil Service Commission and elsewhere in the federal government are demanding that certified minority individuals be given preferences throughout the public and private sectors of our economy. While variously described as "Affirmative Action," "Special Emphasis" and "Compensatory Discrimination," almost all programs designed to implement such preference are, in reality, simply quota programs numerically based upon race and/or sex.

The tragic irony -- that these quota programs, originally proclaimed as attempts to alleviate the lingering suffering caused by past discrimination, have now themselves become rank and oppressive examples of reverse discrimination -- seems lost only upon bureaucratic zealots whose careers will benefit by the continuation of their nonsensical progeny.

While the bureaucrats churn out their orders and plans, the Carter Administration is seeking a vast expansion in federal funding of the enforcement of racial and sexual quotas. The President's proposed 1979 budget demonstrated Mr. Carter's commitment to reverse discrimination as a systematic government policy. Of the $588 million the President proposed to spend on civil rights activities, only $177 -- a mere 20% -- would go for investigation of complaints. More than 22%, $128 million, would go for compliance reviews, a and $133 million, 23%, would be spent on program analysis.

Applied to a local police force, this budget would spend only 20% to investigate crimes which have been committed, while throwing away more than 45% to investigate the innocent -- in order to determine whether they may have committed a crime -- and to pay the salaries of the paper-shufflers at their desks. Clearly, the Carter Administration's Affirmative Action ambitions are expensive and expansive.

On the other hand, more than 80% of the American people, according to a recent Gallup poll, oppose such preferential treatment in education and employment. More indicative of the intensity of opposition to quotas is the fact that 83% of all women and 64% of all nonwhites find such programs objectionable. It is no wonder, though, that the opposition exhibits such substantial magnitude when examples like the following become commonplace features of everyday American life:

A. Two white Texas workers were recently fired on charges of theft of company property while a similarly charged m nority employee was not.

B. Detroit's fire department recently promoted black and Hispanic employees over 36 white firemen, even though the latter had greatly superior experience and seniority.

C. A young white in California was denied admission last fall to a state law school -- despite his grades and test scores being higher than those of 74 of the accepted applicants. The reason for his rejection? The color of his skin did not suit Wa hington's quotacrats.

The injustices perpetrated in these and the hundreds of similar cases are indeed obvious, but likely to be continued. Those who demand, design and decree quotas often appear to do so only out of blind faith. How else can we account for absurd orders like that requiring the Boston School District to to hire blacks preferentially until they comprised at least 20% of the teaching force? It is interesting to note that the city's entire black population accounts for only 16% of the city's inhabitants and barely 1.4% of the area's college graduates.

Numerical quotas, no matter what their title, are constitutionally and morally wrong. The majority of our citizens reject quotas. Yet, the quotacrats blithely require more and more "Affirmative Actions." Our people deserve freedom from quotas; it is now up to the Congress of the United States to insure that freedom.

The House, during this 95th Congress, has already approved the Walker Amendment, which would prohibit appropriation of HEW funds for use in imposing quotas -- but that amendment was rejected by a Senate Committee and faces a tough battle on the Senate floor. Even if passed, the amendment only deals with one federal department -- and one fiscal year. Although specific restrictions on the manner in which federal funds may be expended may offer significant immediate benefits, what is needed in the long run is comprehensive legislation to make it clear that these nefarious bureaucratic schemes must be stopped. To achieve this end, I have introduced H.R. 8375, the Collins Freedom from Quotas Bill, which prohibits racially-and sexually-derived quotas,

goals or other numerical requirements in all employment and educational selection. All such reverse discrimination based upon race and sex would be eliminated by this bill, which enjoys bipartisan support in the House of Representatives. I will reintroduce the bill early in the 96th Congress; I expect strong support to emerge for the bill in both houses of Congress.

While the Collins Freedom from Quotas Bill deals essentially with quotas in the private sector, there is need as well for legislation to end reverse discrimination through quotas in government employment. The infamous "Sugarman Plan" to exempt up to 20% of the management positions within specified federal agencies from coverage by the merit provisions of the Civil Service would be blocked by my House Concurrent Resolution 705. While stopping this notorious creation of the Carter Administration and all other federal employment quotas, my resolution would make clear the intent of Congress that the principle of merit employment never be supplanted by that of racial or sexual discrimination. The federal government spends more -- $245 million -- to impose employment quotas on itself than it does on any other single civil rights activity! These particular quota programs take a number of forms. My bill would have the additional benefit of precluding a return to the corrupt employment practices which prevailed under the hated "spoils system." Only the naive (of which there seem to be many in the White House) can accept claims that politics would not influence the selection of those federal slots exempted under the Carter Administration euphemistically calls "Special Emphasis" programs like Sugarman.

To end the Affirmative Action-inspired reverse discrimination in the awarding of federal contracts and grants to private employers, I have introduced the Collins Anti-Discrimination Act. This bill precludes affirmative action programs mandated in compliance with contract and grant applications by private agencies and businessmen when such programs are derived from racial and sexual quotas. Enactment of this bill will assure that private employers receiving federally-funded contracts and grants will no longer be required to meet discriminatory quotas in their hiring and promotion.

John Stuart Mill knew that "whatever crushes individuality is despotism, by whatever name it may be called." If we truly want to remove the last vestiges of racial and sexual discrimination in America, the vast and growing web of numerical quotas being spun at the insistence of our unelected despots must end. One does not have to be a political philosopher like Mill know that our system will not long remain democratic when programs opposed by over 80% of our citizenry are imposed without regard to the will of that majority.

Representative James M. Collins is the first Republican ever to represent the Third Congressional District of Texas. He was first elected in a special election held in 1968 and is currently serving his sixth term. He has no opposition in this year's race for his seventh term. Mr. Collins, a native of Dallas, holds four academic degrees, including from Southern Methodist University, Northwestern University, the American College and Harvard University. He is Chairman of the Advisory Board of YAF's Task Force on Affirmative Action and is a leading proponent in the House for affirmative action reform.

WALKER AMENDMENT

Representative Robert A. Walker (R-PA) successfully sponsored an amendment to the Labor-H.E.W. appropriations bill (H.R. 12929) which now is before the United States Senate. The Walker amendment represents perhaps the best chance of legislative success in the immediate future for anti-quota forces. The amendment passed the House by the strong margin of 232 to 177.

While the Task Force would have preferred an amendment which was offered by Representative John Ashbrook (R-OH), which would more clearly have disallowed federal monies from being used to support any quotas or "goals and timetables," the Walker approach represents a very good starting point. The Task Force is very concerned, however, about the possibility of misinterpretation of the amendment's apparent allowance of certain "goals and timetables." Quite clearly, though, the amendment is aimed against affirmative action as it is now practiced. As Representative Walker put it, "This amendment in no way strikes out affirmative action programs. It is an attempt to take quotas out of the affirmative action concept."

The Task Force is particularly pleased that Mr. Walker has taken such a strong stand against quotas because he has the potential to be one of the most powerful legislators on civil rights matters. In addition to being young and articulate, his past record as a "freedom rider" in the south during the 1960's established beyond any doubt that he is sincere about his commitment that the law should help all Americans, regardless of skin color, to reach the full limits of their potential, constrained only by personal ability.

WALKER BILL

In addition to the Walker-Levitas Amendment, Representative Walker introduced H.R. 9286. The bill, which has received little Congressional or public attention, is a rather straightforward and simple bill intended to prohibit the federal government from issuing, implementing or enforcing any racial or sex quotas. The only real difference between this bill and the amendment is that the amendment would only affect H.E.W.-Labor appropriations. The bill has 21 co-sponsors. Naturally, the Task Force supports H.R. 9286.

HELMS BILL

Senator Jesse Helms of North Carolina last year introduced a bill (S. 1361) which is specifically tailored to the problems incurred by universities on account of federally-imposed regulations, including affirmative action programs. The "Academic Freedom Act" would not prohibit all affirmative action programs. Rather, it is geared toward eliminating those aspects of affirmative action which are discriminatory and which entail too strict of penalties for noncompliance.

The Helms legislation is supported by the Board of Directors of the American Association of Presidents of Independent Colleges and Universities. The burgeoning paperwork and myriad of regulations involved in federal aid to to higher education have led many university administrators to oppose publicly further federal control. As Senator Helms pointed out in his remarks in the Congressional Record, which he made upon introduction of the legislation, federally-imposed costs to higher education were about $2 billion in 1976--the same amount of money which was voluntarily donated by private contributors. According to Helms, federal regulations sometimes cost schools one-half of the amount of the original grant.

While the "Academic Freedom Act" attacks the wider problem of federal control over higher education, the Task Force heartily endorses the legislation because we recognize the very profound impact which the bill would have on the Department of Health, Education and Welfare bureaucrats who develop and enforce affirmative action programs.

S. 1361 would particularly affect the practice of reverse discrimination in higher education in the following ways:

First, the federal government would not be allowed to enforce any rule which affected the academic standards for admission. A two-track admissions system, such as there was at the University of California at Davis, would no longer be encouraged by bureaucratic regulations issued from Washington, D.C.

Second, fewer schools would be subject to any H.E.W. regulations, as only those schools which receive more than $300,000 or five percent of their annual budgets from federal funds would be subject to administrative regulations.

Third, in order to limit the impact of federal aid cut-offs, such as occurs when a university is found not to meet its racial "goals and timetables," the aid cut-off would affect only those university programs which are found to be in noncompliance with regulations.

Fourth, financial assistance extended to students could no longer be considered as federal aid to the school which those students attend. This ought to be a moot point to begin with. However, the federal government has recently instituted suits against some schools on grounds that they

receive federal aid through the scholarship and loan programs which their students receive. For example, the federal government is currently trying to get Hillsdale College in Michigan to comply with federal regulations in spite of the fact that Hillsdale does not receive any federal money. The justification used by H.E.W. is that some of Hillsdale's students receive scholarship and loans from federal programs. Thus, innocent students stand to lose their financial means to attend college unless Hillsdale buckles under to H.E.W. pressure.

A Call to Action

The seven pieces of legislation which have just been described represent several ways of ameliorating or eliminating the discriminatory aspects of federal affirmative action programs. The Congress has a practical and much needed agenda on civil rights before it. We shall now see if the Congress has the courage and the wisdom to at least openly recognize and debate the alternatives which have been suggested.

While some of the proposals are more far-reaching than others, all are worthy of passage. The Task Force believes that the voters in this country would like to see these kinds of reforms made into law. The major obstacle seems to be that most people just do not know about the legislation and most members of Congress have heretofore been afriad to confront the issue head-on. It is the goal of this Task Force to publicize the Congressional agenda and to lobby the Congress to address itself honestly to the problems.

Neither this Task Force nor any single organization or group can force the Congress to act. However, vocal public opinion can. We strongly urge the public to contact their Representatives and Senators in Washington and urge that they support affirmative action reform legislation. For our part, the Task Force shall do all that it can to bring the issue to the fore, especially among young people, who have the most to gain from the institution of fair and progressive affirmative action reform.

APPENDIX

(Young Americans for Freedom position paper on affirmative action)

Reverse Discrimination

by Clifford White

"Two wrongs don't make a right." "The sons shouldn't have to pay for the sins of the fathers." "Everyone should have to earn what he receives."

Do these phrases sound familiar? You've probably heard these words ever since you were a small youngster. They are wise rules which we were taught always to remember.

Government affirmative action programs which involve racial quotas, though, mock these rules and institute a "Newspeak" worthy of a George Orwell novel.

For many years in this country, individuals were discriminated against because of the color of their skin. The "Jim Crow" system in the south prevented blacks from sitting at the same lunch counter as whites; in the north, more subtle forms of racial bigotry prevented blacks from earning gainful employment.

Americans rejected this system. The Congress passed legislation in 1964 which outlawed discrimination both in employment and most college admissions.

The Civil Rights Act of 1964 was necessary, said prime sponsor Sen. Hubert Humphrey, because some men were "sinful mortals" who hated others just because of skin color.

Instead of following the new law of the land, however, a band of federal bureaucrats—elected by no one and beholden only to other bureaucrats—instituted a system of affirmative action. These programs were ostensibly designed to eliminate the practice of racial discrimination in employment and admissions. Some universities, spurred on by official government policy and their own desires for social engineering, voluntarily followed suit.

The only difference between the new affirmative action and the racism of old is that blacks are now preferred over whites in order to reach some sort of manufactured "racial balance." Somehow, this new injustice is supposed to make up for past injustice.

Civil rights has come full circle. In something out of George Orwell's description of a totalitarian state, a "Newspeak" has been created, whereby non-discrimination means racial quotas. From the days when blacks were unconscionably discriminated against, we have reached the point where the government purposefully encourages discrimination against "non-minorities."

Reverse discrimination is discrimination—and it's wrong. Racial discrimination was wrong twenty years ago and it is wrong today.

As a group of young Americans, Young Americans for Freedom rejects racial quotas. As individualists, we believe that it is insulting to anyone to judge him based on skin color, instead of individual merit. Because we believe in the virtue of competition, we desire equality of opportunity in seeking jobs and college admissions; not false equality of result.

As black economist Walter Williams has written, the fundamental obstacles to minority advancement are government-imposed economist barriers. Minimum wages which price minority youths out of the market and high licensure fees which make it impossible for an average workingman even to operate a taxi service with the family automobile are but two examples of the problem.

Rather than pit one race against another for a single job or college seat, YAF wants to increase the level of opportunity for all Americans. Better economic policies, educational quality and other problems should be tackled. The "zero-sum game" of quotas, in which there is a winner and a loser, is unhealthy and unfair.

Americans are tired of confrontation between individuals on account of race. According to a Gallup poll, 83 percent of all Americans want merit not race to determine employment and admissions. More than sixty percent of all "minorities" feel the same way.

The problem received wide public attention when Allan Bakke was denied admission to the Medical School at the University of California. He was rejected because 16 out of 100 seats were set aside for minorities who had lower qualifications than Bakke. The qualifications included grades, test scores and other factors, such as a personal interview. The United States Supreme Court ordered that Bakke be admitted. YAF filed an *amicus curiae* ("friend of the court") brief in behalf of Bakke. In the brief, we endorsed the view of former Justice William O. Douglas, a prominent liberal, who said that "There is no constitutional right to be preferred." The law should be colorblind.

As YAF sees it, the *Bakke* decision was a positive first step toward eliminating the practice of racial discrimination. Several questions remain, though. YAF wants to outlaw any government-imposed programs which in any way take race into account.

Because this issue is so important—especially to young Americans who are applying to colleges or trying to establish themselves in a job for the first time—we set up a Task Force on Affirmative Action. We will continue to analyze the problem and offer creative alternatives.

YAF believes that every American has the right to be judged as an individual, not as a statistic or mere entity in a larger group. Everyone possesses unique characteristics and talents. We are committed to guaranteeing the right of every citizen to be judged without regard to race.

Won't you join with us in this generations-old American quest for equal opportunity for all of our citizens?

(Clifford White is a YAF National Director and Chairman of YAF's Task Force on Affirmative Action.)

Below is the complete text of Senator James L. Buckley's remarks on March 2, 1976
(from the Congressional Record, March 2, 1976, pp. S2590-S2592)

Twelve years ago, the United States made it illegal to discriminate in employment on grounds of race, color, religion, sex and national origin. That was accomplished when the Civil Rights Act of 1964 became law, and it was properly heralded as the end of one era and the beginning of another. What had been a readily accepted element of the American tradition, equality of opportunity, was made a matter of legal right for all Americans. There is no question but that some Americans, most notably for reasons of race, were being denied equality of opportunity. This legislation not only defined legal rights and duties, but it also proved to have a profound and largely beneficial social impact on the United States. Whatever enforcement problems have subsequently developed, the case for the passage of the law has, it seems to me, been fully vindicated. But, unfortunately, there is more to the story of the Civil Rights Act of 1964 and the national commitment to end discrimination.

To understand the present problem one must go through the details of the legislation in question. First, Title VI of the Civil Rights Act of 1964 requires that any program or activity, including state and local government, which receives federal financial assistance must, as a matter of law, treat all participants equally without regard to race, religion, color, sex or national origin. The act, in Title VII, further prohibits any federal contractors, private employers, or labor organizations from discriminating against applicants for employment on any of the above grounds. In effect, the Congress in passing the legislation was abstracting the social policy articulated in Brown V. Board of Education, the landmark school segregation case handed down in 1954 by the United States Supreme Court, and extending it to federal programs and private employment. The policy was one in which discrimination on grounds of race, religion, color, sex or national origin was prohibited as constituting the antithesis of the principles of individual equality, individual dignity, and individual justice on which the American nation was founded; principles which the Civil Rights movement was designated to translate into full practice.

The second step in the process was taken on September 24, 1965, when then President Lyndon Johnson issued Executive Order No. 11246, which requires federal contractors to take affirmative action "to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color or national origin." Later a sex discrimination prohibition was added to the affirmative action requirements.

The point was clear: the policy of the United States government was not only to prohibit discrimination on the grounds of race, religion color, sex or national origin, but to force action to end inherently discriminatory practices. There would be no substantial issue today if, in the intervening years, the federal government had changed its policy. While the Civil Rights law has not been amended with respect to any of the anti-discrimination provisions and while the executive orders have not in any substantial way been revised, the policies of the federal government have changed substantially. It is to this change that the legislation I am today introducing is addressed.

Lest there be any doubt about Congressional intent behind the Civil Rights Act, and specifically on the question of the nature of discrimination, the Senator from Minnesota, Mr. Humphrey, as leading supporter of the Act, stated there "must be an intention to discriminate" before one could be held to have violated the law. He also stated that the Act "does not require an employer to achieve any kind of racial balance in his work force by giving any kind of preferential treatment to any individual or group. . . the express requirement of intent" would prevent de facto circumstances from being manipulated into a finding of discrimination. Senators Case of New Jersey and Clark of Pennsylvania joined Senator Humphrey in that analysis.

The first notable change came in February, 1970, when the Department of Labor adopted regulations which included the language:

> An affirmative action program is a set of specific result-oriented procedures to which a contractor commits himself to apply every good faith. The objective of these procedures plus such efforts is equal employment opportunity.

It is important to make note of the point that within this rather obscure rhetoric is the redefinition of "opportunity" as a "result." The transposition of federal policy occurred when opportunity was defined in terms of result, or in the later language of composition.

A more explicit change in federal policy came about in late 1971 with the adoption of Revised Order No. 4 by the United States Department of Labor, which was adopted pursuant to both the Civil Rights Act and the executive order. It was this regulation which described in detail affirmative action and the nature of discrimination. In Revised Order No.4, there is no attempt to define "discrimination," as such. A reading of the order requires the conclusion that for purposes of affirmative action requirements, discrimination is "underutilization," which is defined "as having fewer minorities or women in a particular job classification that would reasonably be expected under their availability." The order then details a long series of factors which are to be relied upon in determing whether there is "underutilization."

But the unreasonableness or lack thereof of the criteria begs any serious questions of public policy. Wherever in the law did the doctrine or "underutilization" become the controlling factor in determing whether a party subject to the Civil Rights Act was in violation of the act?

The change came about subtly, through the use of the relatively anonymous mechanism of rule-making whereby an enforcing agency, such as the Departments of Labor and Health, Education and Welfare (HEW), can expand and even redefine the essence of the law it is supposed to enforce. The legal requirement which was initially intended to guarantee equality of opportunity is now being defined as specifically requiring the manipulation of discrimination is turned into a positive duty to discriminate. There is no way to insure a certain result other than by discriminating.

There are a number of examples which illustrate the point. One of the most striking is to be found in the case of the University of California, at Berkeley, of all places, where the federal government relied solely upon the racial and sex composition of the workforce to prove a violation of the Civil Rights Act. In June, 1971, HEW descended upon the campus to conduct

a compliance review. The study lasted for one and a half years. Berkeley personnel did their best to supply all of the data HEW requested. The review culminated in a demand that the University adopt an affirmative action hiring program, although the University was never specifically charged with having discriminatory hiring practices. Nor was the University told what it had to do. The frustration of the University was best expressed by Robert Kerley, the vice-chancellor for administration, who said, "it was a bit like being in a ballgame against a team that was making up the rules as it went along." The University never really had the benefit of a clear-cut government position. There were never any explicit charges or specific demands.

The responsibility for developing an "acceptable" (to HEW) affirmative action program was on the University. What the University was required to overcome was, not a charge of discrimination, but of "underutilization" of minorities, a determination that was in part based upon the population composition of the Bay area. What that has to do with Berkeley's hiring practices is unclear, but it was part of the utilization formula against which the University was judged by bureaucrats having the discretionary power to withold substantial federal funding.

In order to come into compliance with the Civil Rights Act, as implemented by HEW and its guidelines, and to retain the $2.8 million in federal contracts which the University held, the campus administration commenced to gather the necessary date in order to develop "goals" (quotas) which would bring the school up to full "utilization." The project was costly, consuming the time of ten staff members and countless hours of many others connected with the University. But the first Berkeley plan did not satisfy the HEW officials and the threat to cut off the federal contracts was carried out, resulting in the delay of $2.8 million in contracts and no doubt creating severe administration problems with staff payroll and other budgetary obligations. Still HEW did not take an overt position on what would be "in compliance."

Faced with such an intolerable situation, the University had its own statistics department develop plans for hiring minority personnel, with specific goals and timetables. The plan was acceptable to HEW. The utilization formula which was agreed to called for, among other things, certain goals which implied that the University was "under-quota" or "underutilizing" minority personnel. Included in the plan was the University's commitment: 1.38 black professors in the social welfare department and 1.39 Spanish surnamed and native Americans (Indians) as professors for the civil engineering department. In addition, the affirmative action program continues to cost the University at least $400,000 per year. We must remember all this comes against a background wherein the University was not charged with discrimination. But in order to come into "compliance," the University would most certainly have to discriminate and expend substantial resources.

In a less complex situation, but one which is just as outrageous, Congresswoman Edith Greene, in November 1972, testified in a House of Representatives Hearing regarding her own city of Portland, Oregon, which was found to be in "non-compliance" by HEW. Portland, with a black population of 5% of the total, had minority representation in the school system of 15% of the whole. But because Portland did not have 15% representation in each and every job classification within the school system, the city was found to be guilty of discrimination as defined by HEW.

As recently as August, 1975, HEW made a computer run to determine what school systems, if any, assigned faculty to schools in majority/minority patterns that did not mathematically reflect the ratios within the school system in which they were employed. Ninety school systems, including Buffalo, New York, were "indicted by computer" for no reason other than the school administrations had not kept the ratios relatively uniform in schools throughout the system. Here there was not even a charge of "underutilization" but that random assignment was per se discrimination. In Buffalo, and perhaps elsewhere, HEW cut federal funds under the Civil Rights Act.

In another recent case, the Department of Justice, using the goals and guidelines theory of discrimination developed by the Departments of Labor and HEW, filed a civil rights suit against the Sheet Metal Workers Union, Local 28, of New York City, New York. The suit charged the union with discrimination. The allegation of discrimination relied upon the composition of the union membership for the proof of discrimination. A court-ordered quota has been set requiring the union to hire minorities until the membership in the union has been brought up to 29% minority. But again, as in the cases brought under agency guidelines, there was no charge of discrimination as such. "Underutilization" was held to be discrimination, pure and simple.

A second element, in the case of the Sheet Metal Workers Union, was a test administered by the union as part of the application process for apprenticeships. In the landmark Griggs v. Duke Power Company case, the Supreme Court held that when a test eliminates more minorities than non-minorities it becomes the duty of those administering the test to prove its relevance to the job. But since that decision, federal agencies moved federal government policy to the point where validation of the test is a practical impossibility. Professor Nathan Glazer's research in Affirmative Discrimination (New York: Basic Books, 1975), forced him to conclude that the only test which could be safely administered was a typing test, and the Equal Employment Opportunity Commission is not entirely sure about that. But because minorities in New York City did not do as well as non-minorities in the test scores, the Court upheld that the minorities had been "victimized" and ordered the Union to eliminate the test and to pay back pay to those allegedly victimized. But all of this happened in spite of Section 703(H) of the Civil Rights Act, where the clear meaning of the language restricts the review of tests to the question of whether they are "designed, intended or used to discriminate because of race, color, religion, sex or national origin."

To comply with the Federal District Court order, the Sheet Metal Workers Union has been ordered to discriminate, even against those long-standing members presently unemployed and standing-by until construction work becomes available again. Nothing in the court's decision addressed the rights of those who would now be discriminated against and the justice due them. Again, this is all against a background where there was no charge of discrimination.

There is also the problem of costs. The Congressional Research Service has, at my request, been collecting what data there is on the question of the financial costs of the affirmative action programs now being imposed. CRS

found that the costs of affirmative action for the federal government alone in FY1976 are estimated at, unbelievably, $329,296,367. The estimated cost to higher education for the academic year 1974-75 was more than $[illegible]000,000. The study is not complete, but the initial indication is tha[illegible] are literally astronomical.

After having complained to the executive agencies over the past years, and to no avail, I am now convinced that the only solution rests with the Congress of the United States. While it seems to me that the 1964 act makes the Congressional intent crystal clear, others in the federal government, courts and agencies alike, have succeeded in perverting the law to the point of rendering it unrecognizable.

Discriminatory hiring practices have no place in our country. America should pride itself upon guaranteeing each of its citizens an equal opportunity to earn a decent living. To benefit one man at the expense of another, for reasons no more relevant than sex, or race, or national origin, is a perversion of civil rights. Reverse discrimination is discrimination, and it was discrimination the Congress prohibited twelve years ago.

The bill contains three major provisions:

1. It would reaffirm the federal government's role in requiring as a condition of receipt of any grant or contract that the recipient submit an affirmative action program which assures non-discrimination on the basis of race, religion, color, national origin, or sex, along the lines of Executive Order No. 11246. Such programs would not be allowed to impose the establishment of employment goals, timetables, or quotas based on race, religion, color, national origin or sex.

Any affirmative action program undertaken by contractors, grantees, private employers or labor organizations, whether fashioned by a federal agency or a federal court, would be limited to attempts to expand the pool of applicants or participants. Plans could include an expansion of recruiting practices, including, but not necessarily limited to the expansion of normal advertising and promotion methods, consistent with the financial ability of the concerned parties to undertake such a program. Such programs could-- in fact should-- preclude any qualifications that are unrelated to job requirements, and hence a potential vehicle for discrimination.

The goal would be to ensure that no particular group would encounter any unusual difficulty in seeking out information regarding the opportunity which is advertised, or in being judged on the basis of qualifications alone.

2. In all cases arising under law of the United States, or any regulation or executive order, where the federal government seeks a finding of discrimination, no finding would be allowed solely on the basis of the composition of the workforce or membership in the business, union or program. Such statistical data would be admissible, however, in any hearing before an appropriate agency or court.

3. The Anti-Discrimination Act of 1976 would prohibit the federal government from requiring that data be collected regarding race, color, religion, sex, or national origin. The acceptance by the government of such information would be limited to discovery proceedings under the direction of the court.

There is a certain difficulty in offering this legislation, because the substance should be recognized as the law. The plain meaning of the original legislative language does not need changing. Moreover, this legislation would not be offered but for the actions and interpretations made by the various departments and agencies charged with enforcing the law.

The challenge before the Congress is to do away with quotas, goals, and timetables which necessarily result in discrimination against some for the benefit of others. There is no suggestion made by me that we as a nation withdraw one iota from our commitment to end discrimination on the grounds or race, religion, color, sex, or national origin. To the contrary, the legislation I am offering today will, if enacted into law, reinforce the principles of nondiscrimination and equality of opportunity that are essential to a just and free society.

Young Americans for Freedom

YAF

Route 1, Box 1002, Woodland Road, Sterling, Virginia 22170 (703) 450-5162

September 29, 1978

Mr. Jerome Kurtz
Commissioner
Internal Revenue Service
Washington, D.C. 20224
ATTN: EEO

Dear Commissioner Kurtz:

I am writing to you in response to the proposed revenue procedure which would establish new guidelines for determing whether certain private schools are guilty of practicing racial discrimination and are therefore not qualified for tax exemption under the Internal Revenue Code. I am responding to the proposals as they were published in the Federal Register of August 22, 1978.

This response is made in behalf of Young Americans for Freedom. The organization is the nation's largest conservative youth group, with more than 55,000 members in over 500 chapters across the country. Young Americans for Freedom has a special interest in the issue of affirmative action because it is our constituency which is affected most by discriminatory policies in hiring and admissions at public and private schools and colleges. Consequently, we have been active in the area, having filed an amicus curiae brief in the Bakke case and just completed a 100-page Task Force Report on Affirmative Action.

As I understand the proposed regulations, more than 3,500 schools would be affected. Included in this number would be "church-related and church-operated schools." Therefore, the proposals would have great impact on the policies and finances of a large number of schools which serve several thousand students. Young Americans for Freedom is concerned that these regulations would fundamentally alter the ability of these schools to continue in operation at all. Barring a complete close-down, many of these schools would stand to incur

NATIONAL CHAIRMAN
JOHN S. BUCKLEY
Vienna, Virginia
VICE CHAIRMAN
D. RICHARD COBB
Rochester, New York
SECRETARY
COBY PEEVER
Houston, Texas
TREASURER
JAMES LACY, JR.
Pepperdine Law School

EXECUTIVE DIRECTOR
RON ROBINSON
NATIONAL DIRECTORS
DENNIS BECHTEL
University of Toledo Law School
ROY BRUN
Shreveport, Louisiana
TERRELL CANNON
University of Nebraska Graduate School
FRANK J. DONATELLI
Houston, Texas
PETER FLAHERTY
Boston College
PATRICK S. GEARY
Orange County, California
RANDY GOODWIN
Los Angeles, California
KENNETH L. GRASSO
St. John's University
JEFFREY D. KANE
Bellevue, Washington
JAMES MEADOWS
Corpus Christi, Texas
JERRY NORTON
Alexandria, Virginia
JOHN PARKER
University of Texas
RON PEARSON
Washington, D.C.
LARRY PENNER
Brooklyn, New York
BRAD PETERSON
Silverdale, Washington
TERRY QUIST
Austin, Texas
ROGER REAM
Arlington, Virginia
MITCH SKANDALAKIS
Emory University
SAMUEL M. SLOM
Honolulu, Hawaii
STEVEN E. SOME
Houston, Texas
CLIFFORD J. WHITE
George Washington University

a very significant financial strain if they did not comply with I.R.S. policies. Given the history of affirmative action and other practices enforced by the federal government in order to bring about compliance with antidiscrimination laws and administrative regulations, Young Americans for Freedom is wary that the new I.R.S. rules would entail further racial discrimination (i.e., assist "benefited classes" over other racial and ethnic groups) and impose an inordinate amount of administrative complexities on the affected schools. We know, for example, that universities spend up to $500 per student for affirmative action programs. New and large bureaucracies have been created at several colleges which serve simply to meet federal requirements in the nondiscrimination area. According to some estimates, federal regulations are so complicated that up to fifty cents is expended at many schools in order to receive one dollar in federal grants.

In addition to the cost to the schools, the federal government itself spends a great deal of money in enforcing antidiscrimination regulations. The last thing the federal bureaucracy needs, it seems to us, is more complexity in regulations. The proposed rule changes described in the Federal Register would be difficult to enforce and therefore extremely costly in terms of time and money. Young Americans for Freedom is concerned that a new bureaucracy within the Internal Revenue Service would have to be created in order to enforce the new regulations. The federal government already spends $600 million each year in the civil rights field. The taxpayers cannot afford to spend additional millions in an effort to enforce new regulations which would not enhance our goal of making nondiscrimination a fact of everyday American life.

I would like to specifically respond to each of the major provisions of the proposed regulations.

To begin, I find the definitions set forth in the guidelines to be poorly drawn and incongruous with the objective of guaranteeing that all policies of tax-exempt schools are racially nondiscriminatory. The regulations define minorities as including only Blacks, Hispanics, Asians or Pacific Islanders, and American Indians or Alaskan Natives. These classifications are entirely misleading. There is no "majority" group in this country. Every American belongs to one racial or ethnic group or another. Further, no single group has cornered the market on disadvantages. To seek to protect only a few classes of citizens is, in the view of Young Americans for Freedom, both contrary to the United States Constitution and Western social and political tradition. If the aim of the I.R.S. is to ensure that each school has a valid sample of the population in any given student body (and thereby infer that the school concerned has nondiscriminatory policies), then I suggest that you consider the implications of such a point of view. According to sociologist Pierre L. Van Den Berghe:

> A proper sociological caucus should contain two Blacks (oneman, one woman); one Chicano (or Chicano on alternative elections); one person to be, in alphabetical rotation, Amerindian, Asian, and Eskimo; and sixteen white Anglos. Of the latter, eight will have to be men and eight women; fourteen will have to be hetrosexual and two homosexual (one of these to be a lesbian); one Jewish, ten Protestant,

> four Roman Catholic; and one, in alphabetical rotation, Buddhist, Morman, and Muslim; fifteen will have to be sighted and one blind; eight must be juvenile, four mature and four senile; and two must be intelligent, ten mediocre, and four stupid.

In terms of the I.R.S. definition of a "reviewable school," the proposed regulations would consider all schools which do not have twenty percent enrollment of minorities as suspect. In effect, the I.R.S. would indict such schools according to mere statistics and shift the burden of proof on those schools to demonstrate that they do not discriminate. Statistics do not show compliance with law. Even if a school boasts more than twenty percent minority enrollment, it might still discriminate. After all, discrimination is committed against individuals, not groups of people. If the I.R.S. successfully persuades a school to meet a particular racial quota, the school may still be unlawfully and unconscionably refusing admission to qualified minority applicants.

Young Americans for Freedom totally disagrees with the proposed regulations as they would disregard the intent to discriminate in determining whether or not to discontinue tax-exempt status. Wherever there is a court-ordered busing plan, the private schools in the community would be presumed guilty of illegal discrimination, barring the possibility that they have reached an I.R.S.-imposed quota. Is it inconceivable to the Commissioner that a school may be guilty of no illegality and yet boast only 19 percent minority enrollment? Statistics prove very little in terms of assessing compliance with law. Granted, they may serve as important evidence in assessing a school's compliance with nondiscrimination law and administrative regulation. However, I think that some credence should be given to the admonition of eighteenth-century British leader Benjamin Disraeli: "there are lies, damned lies and statistics."

The five criteria which would be applied in determining compliance are, for the most part, discriminatory in and of themselves. Let me comment briefly on each of the five:

-Scholarships would have to be awarded to a significant number of students who belong to one of the "benefited classes." In affect, this would entail discrimination against equally qualified students who just happen to belong to a group which is not preferred by the I.R.S. regulations. The case of Philip DiLeo serves as a good example of the inequities created by such a system. Mr. DiLeo is an Italian-American who grew up in the economically disadvantaged Little Italy section of New York. When he applied to law school at the University of Colorado, he was accepted under a special program which was designed for disadvantaged students. When the admission committee discovered that Mr. DiLeo was not Hispanic, as they had presumed, his acceptance was withdrawn. Is it inconceivable to the Internal Revenue Service that an Italian-American might be every bit as disadvantaged as an Hispanic American? In order to end the practice of discrimination, the I.R.S. would require specifically that race be a major factor in parcelling out scholarships. The I.R.S. would require discrimination in order to end discrimination. Where would the practice end?

-The affected schools would have to undertake extensive recruitment efforts

in an attempt to increase minority enrollment. Young Americans for Freedom endorses any attempts to expand the pool of applicants to any school and to encourage disadvantaged students to apply. However, to encourage applications based only upon race and ethnicity is inherently discriminatory and averse to everything Young Americans for Freedom believes in. Such a policy would also be contrary, in our view, to the 1964 Civil Rights Act and the Constitution.

In effect, the regulations would impose a double-standard in admissions. This would not only be discriminatory and unfair, but would increase the chances that the academic standards of a school would be compromised. At a time when the quality of available education in this country seems to be significantly decreasing, the government should try to reverse the trend and not to further exacerbate the problem.

-A school would have to reach minority enrollment of twenty percent in order to be considered not guilty. Our goals ought to be to bring about equality of opportunity for all of our citizens, regardless of race—not a pseudo-equality of result which is based upon race. University of Chicago sociologist James Coleman has recently repudiated busing programs which are aimed at reaching a racial balance. He said that the belief that such policies will increase the quality of education are "incorrect...wishful thinking." Economist Thomas Sowell has characterized racial quotas as only seemingly benign, but in fact quite destructive. He call quotas "the noble lie of our time."

As I mentioned before, it seems to me that any of several groups in this country has suffered and currently suffer from disadvantages of one sort or another. A review of the ethnic backgrounds of a student body cannot ascertain whether or not unlawful discrimination occurs. For example, thirty percent of the American population is Roman Catholic, yet a far smaller percentage of our college graduates are Catholic. This is not ipso facto proof of discrimination against Catholics. Discrimination against Catholics does occur, no doubt; but, a specific finding to that effect may be made based only upon individual cases, not aggregate statistics.

-A significant number of minority teachers would be another criterion used in determining nondiscrimination. Such a criterion compromises the quality of education (i.e., if teachers are hired according to race, instead of ability) and is unjustifiably discriminatory.

-Among the several other criteria described under the major heading of the fifth category ("other substantial evidence of good faith") in the proposed regulations is the existence of a minority-oriented curriculum. Young Americans for Freedom is strongly suspicious that such a policy might involve preferring certain ethnic history courses over others--e.g., Afro-American history would be taught, but not Irish-American history. Further, we are concerned that such courses might involve teaching which emphasizes the dissimilarities between the cultures in our population and thereby create divisiveness. Ethnic history is a delicate subject and we believe that the federal government ought to neither encourage nor discourage the teaching of it. Such educational policies should be decided by qualified teachers, not federal officials.

In conclusion, Young Americans for Freedom is grateful for the opportunity to respond to the proposed regulations. We oppose these regulations in their entirety and hope that they will be either abandoned or significantly redrawn.

We are committed to guaranteeing every American the advantages needed to reach the full limits of his potential, regardless of race and sex. We humbly submit that these regulations would be counter to that goal.

Sincerely,

Clifford J. White III

Clifford J. White III
National Director

CJW/jc

MODEL LEGISLATION

A BILL

To regulate the use of affirmative action programs, to prescribe the requirements for a finding of employment discrimination, to ensure that the litigation of discrimination cases does not result in discriminatory remedies, to prescribe reasonable limits to the collection of data concerning race, religion, sex, national origin, or age, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, divided into sections according to the following table of contents, may be cited as "The Anti-Discrimination Act:"

TABLE OF CONTENTS OF THE ANTI-DISCRIMINATION ACT

Section 1. Definitions

Section 2. Affirmative Action

Section 3. Requirements for Finding of Discrimination

Section 4. Remedies

Section 5. Collection of Data

Section 4. Legal Fees

Section 7. Increased Penalties

Section 8. Discriminatory Prefrences Repealed

THE ANTI-DISCRIMINATION ACT

DEFINITIONS

Section 1. For the purposes of this Act, the following definitions will apply:

(a) "contractor" includes any contractor subject to part II or part III of Executive Order No. 11246, issued September 24, 1965, as amended;

(b) "employer" means any employer subject to the provisions of title VII of the Civil Rights Act of 1964 (as amended), any employer subject to part II or part III of Executive Order No. 11246, issued September 24, 1965, as amended, and the United States;

(c) "employment agency" means any employment agency subject to the provision of title VII of the Civil Rights Act of 1964 (as amended);

(d) "grantee" includes any person subject to the provisions of title VI of the Civil Rights Act of 1964; and

(e) "Labor organization" means any labor organization subject to the provisions of title VII of the Civil Rights Act of 1964.

AFFIRMATIVE ACTION

Section 2.

(a). In carrying out the provisions of

(i) titles VI or VII of the Civil Rights Act of 1964, as amended,

(ii) Executive Order No. 11246, issued September 24, 1965, as amended by Executive Order No. 11375, issued October 13, 1967, and Executive Order No. 11478, issued October 8, 1969, or

(iii) any other federal law, regulation, or executive order relating to non-discrimination on the basis of race, religion, national origin, age or sex,

each department and agency of the federal government may require that any grantee or any contractor subject to a grant or contract made by that department or agency and any employer, employment agency, or labor organization shall submit as a condition of such grant or contract an affirmative action program, if the affirmative action program accords with the provisions of this Act.

(b). No affirmative action program subject to this Act may require:

(i) provisions relating to quotas or percentages of individuals on the basis of their race, religion, national

origin, age, or sex comprising the workforce, membership or clientele of the subject of the program; or

(ii) provisions for goals, preferences, formulas, or objectives designed to establish quotas or percentages as described in paragraph (b)(i) of this section.

(c). Affirmative action programs authorized by this Act will be designed to extend, on the basis of individual or aptitude qualification and without regard to race, religion, national origin, age or sex, the pool of applicants or participants in the workforce, membership, or clientele of the subject of the program. Any such affirmative action program may include provisions for the expansion of normal advertising and promotional methods in order to ensure that individuals of particular race, religion, national origin, age category, or sex do not encounter unusual difficulty in obtaining information as to opportunities to be a member, employee, or client of the subject of the program.

REQUIREMENTS FOR FINDING OF DISCRIMINATION

Section 3.

(a) Notwithstanding any other provision of law, in carrying out the previsions of

(i) titles VI or VII of the Civil Rights Act of 1964, as amended,

(ii) Executive Order No. 11246, issued September 24, 1965, as amended by Executive Order No. 11375, issued October 13, 1967, and Exeucitive Order No. 11478, issued October 8, 1969, or

(iii) any other federal law, regulation, or executive order relating to non-discrimination on the basis of race, religion, national origin, age, or sex,

no department or agency of the federal government and no court of the United States will make any finding of discrimination based solely on the composition of the work force or the membership of an employer, employment agency, or labor organization.

(b) In any action to enforce the provisions of any law or executive order in subsection (a) of this section before a department or agency of the federal government or in any court of the United States, data on the composition of the work force or membership of any employer, employment agency, or labor organization is admissible: Provided, however, That such data may not be compared with evidence of the composition of a labor market drawn upon by an employer, employment agency, or labor organization, unless said labor market evidence reasonably indicates the prevalence within the labor market of the skills required for competent job performance, notwithstanding that such evidence may not be available.

(c). In any action to enforce the provision of any law or executive order specified in subsection (a) of this section before a department or agency of the federal government or in any court of the United States, no relief will be granted unless the department, agency, or court finds that the employer, employment agency, or labor union has committed an act of discrimination and specifies with particularity its manner of commission.

Section 4. In carrying out the provision of

(i) titles VI or VII of the Civil Rights Act of 1964, as amended,

(ii) Executive Order No. 11246, issued September 24, 1965, as amended by Executive Order No. 11375, issued October 13, 1967, and Executive Order No. 11478, issued October 8, 1969, or

(iii) any other federal law, regulation, or executive order relating to non-discrimination on the basis of race, religion, national origin, age, or sex,

no department, agency, or court may grant any remedy, and no party to litigation may agree to any settlement, if the remedy or settlement establishes

(A) quotas or percentages of individuals on the basis of their race, religion, national origin, age, or sex comprising the workforce, membership, or clientele of a party charged with the discrimination;

(B) provisions for goals, preferences, formulas, or objectives designed to establish quotas or percentages as described in part (A) of this section; or

(C) remedial preferences or benefits for individuals who were not discriminated against by the party charged with the discrimination, unless such preferences or benefits are insignificant and result from an inability to identify the victims of discrimination with precision or upon reasonable expense.

COLLECTION OF DATA

Section 5. In carrying out the provision of

(i) titles VI or VII of the Civil Rights Act of 1964, as amended,

(ii) Executive Order No. 11246, issued September 24, 1965, as amended by Executive Order No. 11375, issued October 13, 1967, and Executive Order No. 11478, issued October 8, 1969, or

(iii) any other federal law, regulation, or executive order relating to non-discrimination on the basis of race, religion, national origin, age, or sex.

no department or agency of the federal government and no court of the United States may require that parties subject to these provision collect data regarding the race, religion, national origin, age, or sex of employees, members, clientele, or program participants, except (A) as necessary for pre-trial discovery precedures or (B) to monitor compliance with remedies for prior violations of these provisions.

LEGAL FEES

Section 6. Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000-5(k), 78 stat. 259) is amended to read as follows:

"in any action or preceeding under this title, the court will allow prevailing parties, other than the Commission or the United States, all reasonable expenditures necessary for obtaining the relief, judgment, or findings on which the particular party prevailed, including, but not limited to, the following:

(i) attorney fees,

(ii) witness fees,

(iii) expenditures incidental to discovery,

(iv) wages lost due to participation as a party to the action or preceeding,

(v) employee services lost due to participation in the action or preceeding may be offset against each other."

INCREASED PENALTIES

Section 7. Section 706(g) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(g), is amended by the addition of the following:

"Monetary damages determined pursuant to this paragraph (g) will be increased by a factor of 3 if (i) the wrong was a matter of organizational plan or policy of an employer with more than 100 employees or was committed with knowledge that it was contrary to law and (ii) defendant is allowed the opportunity for trial by jury."

DISCRIMINATORY PREFERENCES REPEALED

Section 8(a). Section 106(f)(2) af the local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. 6705(f)(2), is repealed.

Amendment to H.R. 12929, As Reported

Offered by Mr. Walker

Page 46, immediately after line 12, insert the following new section:

Sec. 410. No part of any appropriation contained in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order which includes any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex, and which requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity.